Laborers Local No. 135 (Bechtel Power Corporation and General Building Contractors Association) *and* Andrew Huggins *and* Judith B. Chomsky. Cases 4–CB–4204 and 4–CB–4256

February 28, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On October 20, 1988, Administrative Law Judge Norman Zankel issued the attached supplemental decision. The General Counsel and the Respondent[1] filed exceptions and supporting briefs. The Respondent filed a brief in opposition to the General Counsel's exceptions, and the General Counsel and the Charging Parties filed briefs in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions to the extent consistent with this Supplemental Decision and Order, and to remand the case to the Regional Director for the preparation of an amended backpay specification in accordance with our findings below.

I.

A.

This backpay proceeding was engendered by the Board's earlier decision,[3] in which the Board found that the Respondent, Laborers Local 135, had repeatedly discriminated against eight individuals,[4] in violation of Section 8(b)(1)(A) and (2), by failing and refusing to refer them in proper order from its hiring and referral hall. The Board found that ''literally hundreds, if not thousands, of discriminatory referrals took place'' between late 1980 and the date of the hearing in mid-1982. However, the Board did not identify any specific out-of-order referrals that had taken place during the relevant period; instead, it simply found that all out-of-turn referrals during that period were unlawful. The number of individuals unlawfully preferred, their dates of employment and rates of pay, and other related matters were left to be determined at compliance.

The Board's decision contained several provisions that have significance for the computation of the discriminatees' backpay. First, the Board delineated for each individual the period(s) of time during which any out-of-order referral would be deemed unlawful. In the case of Wilson Bradley, for example, the Board found that he had registered for referral in June or July 1980 and on three occasions in 1981, but was not referred until August 21, 1981. (Bradley did not reregister after his August referral.) Accordingly, any out-of-order referrals between December 5, 1980 (the beginning of the 10(b) period), and August 21, 1981, were deemed unlawful.[5] By contrast, Roy Poorman was found to have registered on March 5, 1980, and June 23, 1981, received a referral on July 13, 1981, to a 2-day job, was improperly stricken from the register,[6] and was not referred again. All out-of-order referrals between December 5, 1980, and July 13, 1981, and *since* July 16, 1981, were deemed unlawful.[7] Similarly, Harold Coates registered in December 1980 or January 1981 and was referred on June 17, 1981; he reregistered on July 6, 1981, and was referred on July 13; he reregistered again on November 24, 1981, and February 10, 1982, and was referred at some time in February 1982. All out-of-turn referrals between at least January 31 and June 17, 1981, between July 6 and 13, 1981, and between November 24, 1981, and at least February 10, 1982, were unlawful.[8] Thus, for at least some of the discriminatees, the underlying decision obviously contemplated that additional unlawful referrals could be found since, or after, certain specified dates,[9] including future dates not even covered by the unfair labor practice proceeding. In addition, the mere fact that a discriminatee had received a referral (for example, Coates) did not preclude the finding of additional acts of discrimination at later times after he or she had reregistered.

Second, the Board imposed a remedy requiring the Respondent to make each discriminatee whole ''*from the date of the discrimination* until the time the Respondent Union *ceases* its unlawful conduct by *properly* referring him or her to employment . . . .''[10]

[1] At the Respondent's request, we have deleted from the caption Case 4–CB–4260, which was consolidated with the captioned cases but which is unrelated to this backpay proceeding.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not rely on the judge's statement in fn. 7 of his decision, that the facts in this case are ''substantially undisputed.'' We correct the first sentence in par. 3 of part III,C,2 of the judge's decision to end with ''November [not March 29] 1983.'' We also note that the correct citation to *Waco, Inc.*, (see the judge's fn. 6) is 273 NLRB 746 (not 714) (1984).

[3] 271 NLRB 777 (1984), enfd. mem. 782 F.2d 1030 (3d Cir. 1986).

[4] Wilson Bradley, Andrew Huggins, Randy Huggins, George Scott, Roy Poorman, Harold Coates, Rita McMillan, and Fred Gray.

[5] 271 NLRB at 781.

[6] Because the referral was only for a 2-day job, Poorman's name should have remained on the referral register, from which he could have been referred again at the end of his job.

[7] Id. at 782.

[8] Id. at 781–782.

[9] See also George Scott (out-of-order referrals *after* November 24, 1981, unlawful), and Fred Gray and Rita McMillan (out-of-turn referrals *since* March 5, 1982, violative). 271 NLRB at 781–782.

[10] 271 NLRB at 783 (emphasis added).

Three things are clear from that requirement. First, backpay would accrue only from the date discrimination against each individual was shown to have commenced. Second, the Board contemplated make-whole relief until the Respondent ''*ceases*'' to discriminate, whenever that event might occur; if the discrimination was found to have continued past the date of the Board's decision, so be it—backpay would continue to accumulate into the future. Third, relief would be afforded not simply until the discriminatees were referred, but until they were referred *in the proper order*.

Finally, the Board's July 31, 1984 Order required the Respondent to ''[k]eep and retain . . . permanent written records of its hiring and referral operations that will be adequate to disclose fully the basis on which each referral is made . . . .''[11] It also required the Respondent—as had the administrative law judge in his December 6, 1982 decision—to ''[p]reserve. . . all records, reports, work lists, and all other documents necessary to analyze the amount of backpay due . . . .''[12] Thus, by December 6, 1982, and certainly by July 31, 1984, the Respondent was on notice that it was required to maintain records of its hiring hall operations that would enable the Board to calculate the amounts of backpay due the discriminatees.

B.

The backpay specification was compiled by Compliance Officer James Curley. Curley began his investigation in late 1984. As the judge discussed in detail,[13] Curley's review of the Respondent's hiring hall records convinced him that it was impossible to discern from those records whether referrals had been made in or out of proper order or, indeed, whether referrals had been made at all.[14] The referral book consisted simply of a list of names, some of which had been crossed out, usually at unspecified times and for unstated reasons. Daily referral sheets showing the names of laborers who had received referrals, along with the dates of the referrals, the names of requesting contractors, and specific skills requested (if any) were no longer being kept by the Respondent.

Having determined that it was impossible to reconstruct a record of out-of-order referrals from the Respondent's hiring hall records, Curley chose to use the ''representative employee'' approach to compute the discriminatees' backpay. That is, he extracted a random sample of 49 laborers from the Respondent's membership list, computed the average hours worked by the laborers in the sample during each quarter of the backpay period, and assumed that, but for the Respondent's discrimination, each of the discriminatees would have worked the same number of hours in each quarter as the sample average.[15] He then used the projected hours worked as the basis for computing gross backpay for each claimant.

For all but two of the discriminatees, Bradley and Randy Huggins, Curley concluded that the backpay period should extend past the end of the periods for which discrimination had been found in the underlying unfair labor practice case.[16] He based that conclusion on the provisions of the Board's Order, summarized in part I, above, that the Respondent should make the discriminatees whole ''until it *ceases* its unlawful conduct,'' even though some of the discriminatees had received referrals.[17] However, the specification does not claim backpay for McMillan after late 1984, when she left the area to go to college, or for Poorman and Scott after early 1986, when they were referred to jobs at Bechtel, which they still occupied at the time of the backpay hearing.

C.

In the main, the judge approved the General Counsel's approach to establishing the Respondent's backpay liability. Specifically, he agreed that it was proper to extend the backpay period past the end of the hearing in the unfair labor practice case for all the discriminatees except Bradley and Randy Huggins. On the basis of his review of the Respondent's hiring hall records, he agreed with Curley that those records, standing alone, did not reveal whether the Respondent had ceased its discriminatory conduct and had referred the discriminatees in the proper order. He further endorsed the ''representative employee'' approach that Curley had used to estimate the amounts the discriminatees would have worked during the backpay period, in the absence of discrimination. And he granted the General Counsel's request (made after the hearing) that the backpay periods be kept open until the Board issued its Supplemental Decision and Order in this case.

The judge bolstered his finding that it was proper to extend the backpay period past 1982 by examining evidence concerning payments made into the industry's health and welfare fund at various dates in 1983 and

[11] Id. at 784.

[12] Ibid.

[13] See part III,C,4 of the judge's decision.

[14] It appears from the record that Curley was reviewing the records of the Respondent's hiring hall operations since the unfair labor practice hearings.

[15] Curley's methodology is discussed in detail in part IV,C,1 of the judge's decision. Included in that discussion are Curley's reasons for rejecting alternative formulas. We shall consider those matters shortly.

[16] Bradley received a referral on August 21, 1981. Randy Huggins received no referral during the 10(b) period, but was stricken from the register on May 19, 1981, because he was working. Neither re-signed the referral book thereafter. The General Counsel does not seek backpay for Bradley after August 21, 1981, or for Huggins after May 19, 1981.

[17] In the case of Andrew Huggins, the specification claims backpay on an open-ended basis, even though the Board's Order refers to unlawful referrals only between December 5, 1980, and April 9, 1981. Curley testified that he revised the specification, which originally had claimed backpay only for that period, in response to Huggins' complaints to him that the Respondent was still discriminating against him, and in light of what Curley had learned about the way the Respondent was operating its hiring hall and keeping its records.

1984 on behalf of some of the laborers in the General Counsel's sample. By comparing the dates for which the payments were made, the judge was able to estimate the times those laborers obtained work in the industry. If one of those individuals either was not on the register, or had signed after one or more of the discriminatees, but went to work before the discriminatees, the judge found an ''apparent'' out-of-order referral. In fact, he found numerous such ''apparent'' discriminatory referrals.[18] However, he specifically stated that he was not making independent new findings that the Respondent had engaged in unlawful conduct during the backpay period.

D.

The General Counsel has excepted to the judge's findings of ''apparent'' bypassing of the discriminatees during the backpay period, and to his failure to find that out-of-order referrals *actually* were made. The General Counsel further excepts to the judge's refusal to make independent new findings that the Respondent continued to engage in unlawful conduct during the backpay period. The Respondent excepts to the judge's decision on numerous grounds, the most substantial of which are discussed in part II of this decision.[19]

[18] See part III,C,2 of the judge's decision.

[19] The Respondent argues, inter alia, that it was prejudiced by the participation in this case of Compliance Officer Curley, who it contends was biased against it. As evidence of that alleged bias, the Respondent cites Curley's testimony that his brother-in-law, who is a member of the Respondent and who has signed the referral register, has never received a referral. The Respondent also relies on Curley's allegedly slipshod investigation of the backpay claim of Stephen Michael Deitz, which was withdrawn by the General Counsel during the hearing. We find no merit in the Respondent's contentions.

In the first place, we detect no bias against the Respondent on the part of Curley. Although Curley did testify that his brother-in-law had not received a referral, he also testified that his brother-in-law got jobs on his own, worked regularly in the industry, and had not complained to Curley about being bypassed. In these circumstances, it would be as logical to infer bias on Curley's part in favor of the Respondent as against it. (Even the Respondent's counsel conceded at the hearing that Curley's brother-in-law might want to *minimize* the Respondent's backpay liability.) Curley's characterization of the Respondent's hiring hall records as virtually useless was seconded by the Respondent's own expert witness (see fn. 20, below), and is borne out by our independent examination of the documents. And although we find, for reasons set forth below, that the backpay model used by Curley did not yield the most accurate estimate of the discriminatees' actual losses, that model had a reasonable basis in settled Board law. Finally, even if Curley's investigation of the Deitz claim left much to be desired, as the Respondent contends, we would not infer bias on Curley's part from that fact alone.

Moreover, even if Curley actually had been biased against the Respondent and had allowed his bias to influence his investigation of the other backpay claims and his selection of a model for the backpay specification, the Respondent still would not be prejudiced, because we will not uphold the specification unless we find that the model on which it is based and the amounts of backpay awarded are justified by all the record evidence. Cf. *Redway Carriers*, 274 NLRB 1359, 1371 (1985) (''[T]he adequacy of the preliminary investigation is administratively tested, not by an investigation of the investigation, but by the General Counsel's ability in an open hearing to demonstrate by a preponderance of the credible evidence that the respondent has engaged in the unfair labor practices alleged in the complaint.'') In analyzing the positions of the parties in this regard, we are not required to consider the issue of Curley's credibility, because we rest our findings entirely on documentary evidence and the testimony of other witnesses. And, as we shall make clear, when we find that the backpay specification makes claims that are not supported by the record, those claims will be modified or eliminated.

II.

At the outset, we observe that many of the difficulties presented by this case are the direct result of the Respondent's failure to keep records that would enable the Board to determine when, or even if, discriminatory referrals were made during the backpay period. We have reviewed the Respondent's records, and we agree with Compliance Officer Curley, the judge, and even the Respondent's own expert witness[20] that those records, by themselves, do not establish whether referrals were made at all during extensive periods of time, let alone whether they were made in the proper order. The Respondent's records are, in the main, a vast, trackless waste consisting primarily of page after page of names with no indication whatsoever as to whether any of the individuals on the list received referrals, or when those referrals were made.[21] In many instances, it is impossible to tell even when the individuals registered for referral (though the records do at least establish the order in which they registered).

It was not always thus. Prior to the hearing in the unfair labor practice case, the Respondent kept records showing which individuals were referred, their dates of referral, and the contractors for whom they went to work. Some 1800 of those referral sheets were received in evidence in the underlying case; they establish that, in fact, the discriminatees were bypassed frequently in favor of other registrants who had signed the referral book after the discriminatees.[22] However, John Weaver, the Respondent's secretary-treasurer, testified that the Respondent ceased to use those forms in ''approximately 1981''[23] because they ''actually had no use in the office.''[24]

As we have noted, the Respondent was on notice after December 6, 1982 (the date of the judge's deci-

[20] Professor Ezra Krendel, testifying for the Respondent, stated that he had reviewed the Respondent's hiring hall records and found them to be ''chaotic . . . a totally disorganized mess'' and ''such a poorly kept record that I couldn't see how it could be used for any physical evidence of activity on the part of the union or not on the part of the union.''

[21] Many names are marked out without dates or explanations. When asked the significance of a registrant's name having been crossed out with no date, the Respondent's secretary-treasurer, John Weaver, testified, ''Gentlemen can be working and not obtain the job through the hall.'' This testimony is unhelpful for at least two reasons. First, some crossed-out names are accompanied by the notation ''WK'' and dates; Weaver testified that those notations mean that the individuals were marked out on those dates because they were working. That other marked-out names do not bear similar notations casts doubt on any implication by Weaver that *all* marked-out names were of individuals who had obtained jobs on their own. (This instance is only one of many in which Weaver's attempts to explain the workings of the Respondent's hiring hall were confusing, contradictory, or wholly inadequate.) Second, even if all such individuals had obtained jobs without going through the hiring hall, the absence of dates by their names makes it impossible to tell how long they were registered for referrals before they were crossed out, and thus whether they were passed over for referrals before they began working.

[22] See part II,A, below.

[23] In fact, those forms were in use at least until December 29, 1981.

[24] The Respondent used forms containing similar information between November 1984 and May 1985, but then stopped. Since August 1, 1986, the Respondent's referral register contains notations of occasions on which applicants were called and referred.

sion in the unfair labor practice case), that it was required to retain records that would enable the Board to compute the amount of backpay due. And, as we have also observed, the Board's Order of July 31, 1984, explicitly required the Respondent to keep written records that would disclose the basis on which each referral was made. We find the Respondent's continued failure to keep adequate records especially disturbing under these circumstances. That failure inevitably has engendered considerable uncertainty concerning both the Respondent's actual treatment of the discriminatees during much of the backpay period and the extent of its backpay liability. Under well-settled law, the Respondent—the wrongdoer—must bear the burden of the uncertainty it has created, and we therefore shall construe the record in favor of the discriminatees whenever such ambiguity exists.[25]

A.

The Respondent contends that the General Counsel has failed to show any specific instances of out-of-turn referrals during the period covered by the unfair labor practice proceedings, and that the judge therefore erred in finding any backpay liability for that period. We reject that contention. Although the General Counsel introduced no evidence concerning out-of-order referrals that took place between late 1980 and mid-1982,[26] we find that backpay is due for that period, because we have reviewed the documentary evidence introduced in the unfair labor practice case and have found numerous instances in which out-of-turn referrals were made.[27]

1. *Rita McMillan*. McMillan signed the referral book on April 24, 1981, and was called for referral on June 24. On May 20, 1981, Silas Clark and C. J. Burrell, both of whom had signed after McMillan, received referrals. McMillan registered again on August 5, 1981, and was referred on August 26. On August 7, 1981, Richard Jordan and Robert Brown, each of whom had signed after McMillan, received referrals. McMillan reregistered on October 13, 1981, and was referred on November 19. Bernard Thompson, who had signed after McMillan, was given a referral effective October 16. McMillan signed again on March 5, 1982, and was not referred. Notations in the Respondent's hiring hall book indicate that Luther Gilliam signed and was referred on March 16, 1982. We find that McMillan was unlawfully bypassed on May 20, on August 7, and on October 16, 1981, and on March 16, 1982.[28]

2. *Randy Huggins*. Huggins signed the referral register on February 27, 1981, and did not receive a referral. E. Campos and F. Fuentes, both of whom signed after Huggins, were referred to Bechtel on March 9. Tommy Johnson and Joe Allen, both of whom signed after Huggins, received referrals on April 27. We find that Randy Huggins was unlawfully bypassed on March 9 and April 27, 1981.

3. *Wilson Bradley*. Bradley signed the referral book on February 27, 1981, and was referred on August 21. William Dunstan, James Lessen, and Lee Joyner, all of whom signed the book after Bradley, received referrals on March 18. John Anderson signed the book on March 27 and was referred to Bechtel on April 7. Robert Trogdon Jr., who signed after Bradley, received a referral on July 23. We find that Bradley was unlawfully bypassed on March 18, April 7, and July 23, 1981.

4. *Harold Coates*. Coates signed the register in December 1980 or January 1981. Kenneth Council, who signed in February 1981, was referred to Bechtel on March 2. Richard Jordan, who signed after Coates, was referred on April 27. Coates signed again on July 6, 1981, and was referred on July 13. Jimmie Harrison signed after Coates and received a referral on July 9. Coates signed once more on November 24, 1981, and was not referred. Raymond Brinkley and Charles Summers signed the book after Coates and were referred on December 29 and 23, respectively. Coates signed the book again on February 10, 1982. Albert Raymond signed on February 26; a notation in the Respondent's hiring hall register indicates that Raymond was referred to Bechtel on an undetermined date. We find that Coates was unlawfully bypassed on March 2, April 27, July 9, and December 23 and 29, 1981, and on the date in 1982 when Raymond was referred to Bechtel.

5. *Fred Gray*. Gray signed the book on April 24 and June 12, 1981, and was not referred. Leonard Lockman, who signed after Gray, received a referral on May 11, 1981. Gray registered again on March 5, 1982. Fred Scott signed after Gray, and a notation in the register indicates that he received a referral on

[25] See, for example, *United Aircraft Corp.*, 204 NLRB 1068 (1973); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 573 (5th Cir. 1966).

[26] In this regard, we find merit in the Respondent's exception to the judge's statement in part III,A of his decision that the Board found that the Respondent discriminated against the discriminatees during the time periods set forth in the Board's decision. In fact, the Board found that the Respondent had repeatedly discriminated against the named individuals, but found only that ''all out-of-turn job referrals within the 10(b) period were unlawful.'' 271 NLRB at 781. Thus, the Board did not find that anyone had been discriminated against in any specific time period, but instead found simply that, if any other individual had bypassed any of the discriminatees during the applicable periods, that bypass was unlawful. The clear implication was that the General Counsel still had to demonstrate specific acts of discrimination against each discriminatee in order to establish a predicate for a backpay award for that individual.

There is no merit, however, in the Respondent's contention that an out-of-turn referral cannot be found unlawful unless the reason for the bypass can be shown. The Board, as we have noted, found that *all* out-of-order referrals during the relevant period were unlawful. Ibid.

[27] The Respondent is not prejudiced by our consideration of the exhibits in the unfair labor practice case. Those exhibits are part of the record in this proceeding, and we may take administrative notice of them if the occasion warrants. *McDonnell Douglas Corp.*, 270 NLRB 1204 fn. 1 (1984).

[28] McMillan had been terminated for cause by Bechtel, and was ineligible to return to work there. However, except for Gilliam's referral, for which no contractor's name appears, all the individuals who bypassed McMillan were referred to jobs with contractors other than Bechtel. In the absence of evidence that Gilliam's referral was to Bechtel, we decline to find that it was.

March 11.[29] We find that Gray was unlawfully bypassed on May 11, 1981, and on March 11, 1982.

6. *Andrew Huggins*. Huggins signed the register in December 1980 and was referred on April 9, 1981. Derrick Bullock, who signed after Huggins, received a referral on December 9, 1980. Willie Simmons and Glenn Bullock, both of whom signed after Huggins, were referred to Bechtel on February 2, 1981. We find that Huggins was unlawfully bypassed on December 9, 1980, and February 2, 1981.

7. *Roy Poorman*. Poorman registered on March 5, 1980, and was referred on July 13, 1981. David Allemon and John Anderson, both of whom signed after Poorman, received referrals on March 9 and April 7, 1981, respectively. Poorman signed again on February 23, 1982. Wesley Johnson signed on March 2, 1982, and a notation in the referral book indicates that he was referred to Bechtel on an undetermined date. We find that Poorman was unlawfully bypassed on March 9 and April 7, 1981, and on the date in 1982 when Johnson was referred to Bechtel.

8. *George Scott*. Scott signed the book on November 24, 1981, and was referred on January 4, 1982. Jeter Lawrence, who signed after Scott, received a referral on December 7, 1981. We find that Scott was unlawfully bypassed on December 7, 1981.

We agree with the Respondent that, for each discriminatee, the backpay period should commence, not on the earliest date set forth in the Board's decision in the underlying case, but on the date of the earliest discriminatory referral found above. Moreover, in those instances in which a discriminatee was offered or received a referral, backpay shall not be assessed for the period between the date of offer or referral and the date the discriminatee next signed the book.

B.

We turn next to the Respondent's contention that the backpay period may not be extended past the end of the time period encompassed by the unfair labor practice case (that is, mid-1982). We find no merit in that contention. We adopt the judge's finding that the language of the Board's underlying decision[30] clearly requires that the backpay period be extended past the end of the period covered by the unfair labor practice proceedings, if the evidence establishes that the Respondent continued to disfavor the discriminatees in referrals.[31] We also agree with the judge that the simple act of referring one of the discriminatees does not end the Respondent's backpay liability to that individual. The Board's Order mandates backpay until such time as the Respondent *properly* refers the discriminatees; it does not contemplate an end to backpay liability merely because the Respondent may finally have gotten around to referring the discriminatees out of their proper order.[32]

The Respondent also contends that the General Counsel has not carried his burden of showing that specific acts of discrimination continued to occur in the period since the hearing in the unfair labor practice case, and therefore has not established a predicate for continuing backpay liability. We find no merit in that contention.

The judge found numerous instances in which the Respondent made ''apparent'' out-of-turn referrals, to the detriment of the discriminatees, during 1983 and 1984. At least concerning referrals to Bechtel, we agree with the General Counsel that those events constituted *actual* bypasses of the discriminatees[33] during that period. The Respondent has an exclusive hiring hall arrangement with Bechtel, under which Bechtel obtains all of its laborers from the Respondent. Thus it is apparent that each of the individuals whom the judge found to have begun working at Bechtel, while the discriminatees were awaiting referrals, received those jobs as the result of referrals.

There is no merit in the Respondent's contention that it is prejudiced by the judge's use of the health and welfare records in finding that it continued to make out-of-order referrals during the extended backpay period. We rely on those records only to find referrals to Bechtel. As we have noted, Bechtel has an exclusive hiring hall arrangement with the Respondent, and consequently the inference is warranted that whoever went to work at Bechtel did so pursuant to a referral. And although the dates on which Bechtel made health and welfare fund contributions do not establish precisely when each laborer worked the hours for which each contribution was made, we are satisfied that those records do establish that the individuals in question actually did go to work at Bechtel after previously working for other contractors. That the records do not show exactly when the Bechtel referrals were

[29] Like McMillan, Gray had been fired for cause by Bechtel, and was ineligible to return to work there. Lockman's referral, however, was not to Bechtel. The record does not indicate the identity of the contractor to whom Scott was referred. In the absence of evidence that the latter referral was to Bechtel, we do not find that it was. See fn. 28, above.

[30] See part I,A, above.

[31] See *NLRB v. Operating Engineers Local 925*, 460 F.2d 589, 599–602 (5th Cir. 1972). Cf. *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 650–656 (1989), (inappropriate to extend backpay period past end of period covered by unfair labor practice hearings, in absence of language in underlying Board Order indicating open-ended backpay period). The court in *Operating Engineers Local 925* also found significant the presence of allegations in the backpay specification concerning specific unlawful treatment in the period after the earlier hearings. We do not find the absence of such specific allegations fatal in this case because, as we have noted, the sorry state of the Respondent's records largely precludes the identification of specific unlawful bypasses from those records alone.

[32] As the judge observed, the Board found that several of the discriminatees had received referrals during the period covered by the unfair labor practice hearing, and yet those referrals did not end the Respondent's backpay liability with regard to those individuals as of the dates of those referrals. See 271 NLRB at 781–782 (Coates, Poorman, and McMillan).

[33] Except for Gray and McMillan, who were ineligible for reemployment at Bechtel.

made is immaterial; what is material is that the referrals went to other registrants instead of to the discriminatees, who had registered earlier.[34]

Moreover, we have independently reviewed the evidence, and we have found that the Respondent continued to bypass the discriminatees in referrals after April 1984.[35] Thus, Coates signed as number 65 in the Respondent's hiring hall register in effect between April 1984 and July 1986; Scott signed as number 66, Poorman as number 101, and Andrew Huggins as number 162. There is no indication that any of the discriminatees received referrals until March 1986, and there is no record of health and welfare contributions' having been made for any of those discriminatees during that time. Robert Whitfield registered as numbers 261, 270, 322, 334, and 339, and the notation ''Bechtel'' appears by all those entries except number 322. We find that Whitfield was referred to Bechtel on four occasions when Coates, Scott, Poorman, and Huggins, who had registered before him, were still awaiting referral.[36]

In addition, as the judge found, Lawrence King, who had registered as number 571, received a referral in October 1984, in preference to Andrew Huggins,[37] who was registered as number 162. We also find that King bypassed Poorman, who also had registered ahead of him.

Finally, as we have emphasized, the Respondent has largely failed to comply with the directions of the judge in the unfair labor practice case, and then of the Board itself, to retain records that would be adequate to enable the Board to compute backpay. Instead, the Respondent has kept records that, for the most part, do not even reveal whether referrals were made at all, let alone whether they were made in the proper order. Those records were so inadequate for the purposes of this proceeding that they were described as useless by the Respondent's own expert witness.[38] In these circumstances, the fact that the General Counsel did not prove with greater specificity the extent to which the Respondent continued to disfavor the discriminatees in referrals does not absolve the Respondent from backpay liability.[39] As the wrongdoer here, the Respondent must bear the burden of the uncertainty it has created, by its failure to keep adequate records, regarding whether it continued to make unlawful referrals after the close of the hearing in the underlying case.

The Respondent nevertheless urges that we cannot find that the discriminatees were bypassed unlawfully after April 1, 1984, because, effective that date, it revised its hiring hall rules to require applicants to be present in the hall in order to receive referrals, and the General Counsel has not shown that the discriminatees were in the hall when they were bypassed. We find no merit in this contention. It is true that, when such a hiring hall rule exists, the General Counsel normally has the burden of demonstrating that the discriminatees were in the hall when out-of-order referrals took place.[40] Here, however, the Respondent has kept records that, often for months at a time, do not indicate when referrals were made. Consequently, unless he could show that the discriminatees were in the hiring hall every day, and thus were present no matter when referrals were made, the General Counsel could not possibly carry that burden in this case. To deny all backpay under these circumstances would be intolerable, particularly because, as we have emphasized, the

[34] We also find no merit in the Respondent's exception to the judge's using Bechtel's logbook (G.C. Exh. 57) to find that the Respondent's referral book did not give a complete picture of referral activity after August 1, 1986. (See par. 12 of part III,C,2 of the judge's decision.) The discrepancies between the originals and copies of exhibits alluded to by the Respondent pertained to other exhibits, not to G.C. Exh. 57. Moreover, the judge afforded the Respondent's counsel the opportunity to cross-examine using the originals of G.C. Exh. 57, but he did not do so.

In finding that out-of-turn referrals actually did take place, we correct the following misstatements in the judge's decision. Contrary to the judge, Drew Davenport did register for referral, but he did so on November 25, 1983, long after several of the discriminatees had registered. Similarly, C. Tillar, who we conclude is also known as ''C. Luke'' Tillar, did sign for referral, but on January 9, 1984, well after Coates, Scott, and Poorman had registered. Thus, even though both Davenport and Tillar registered, their referrals were unlawful. We do not find Willie Prince's referral to Shoemaker around August 1, 1983, to be unlawful, because Prince had signed the register on May 31, 1983. Finally, we do not rely on the judge's findings concerning referrals of M. DiCastenado, because we have been unable to locate the health and welfare records for that individual on which the judge based his findings.

[35] We do not, of course, find that either Bradley or Randy Huggins was bypassed during this period. Nor do we find any discrimination against McMillan after the third quarter of 1983. McMillan received a referral on October 1, 1983, and the record indicates that job lasted more than 5 days. Consequently, McMillan would have had to reregister to be eligible for further referrals. Because she failed to do so, there is no basis for finding that she was discriminated against after the October 1 referral, and we have tolled her backpay period as of that date.

[36] The register indicates that Coates and Scott were marked out as ''working'' on July 18 and 25, 1984, respectively. Because Whitfield's referrals to Bechtel are not dated, we cannot determine whether some or all of them occurred after Coates and Scott's names were marked out. This is an example of the ambiguity created by the Respondent's inadequate recordkeeping that must be laid at the Respondent's doorstep. Thus, in the absence of evidence to the contrary, we find that the two discriminatees' registrations were still ''active,'' and therefore that they were unlawfully bypassed by Whitfield.

[37] We adopt the judge's finding that Andrew Huggins' backpay period should extend past the end of the period delineated in the Board's earlier decision. We base that finding, however, entirely on the documentary evidence discussed above and on the testimony of King, and not on Curley's conversations and correspondence with Huggins. There is no merit in the Respondent's contention that Huggins should be denied backpay after 1984 because he was found to be legally blind. It is well established that it is the Respondent's burden to show that Huggins was unavailable for employment. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). The Respondent has not established that Huggins' visual impairment precluded his performing the kinds of work to which it makes referrals. Indeed, the Respondent's own records indicate that Huggins received a referral as recently as November 1986. There are no exceptions to the judge's finding that after the first quarter of 1987 Huggins was unable to continue working at his trade.

[38] Also, as the judge found, Weaver admitted that the Respondent's hiring hall books were inadequate to establish the record of referral activity during the backpay period.

[39] NLRB v. Operating Engineers Local 925, 460 F.2d at 600.

[40] *Iron Workers Local 373*, above at 657 (Member Devaney dissenting on this point), citing *Iron Workers Local 433 (AGC of California)*, 228 NLRB 1420, 1441 (1977), enfd. 600 F.2d 770, 779 (9th Cir. 1979), cert. denied 445 U.S. 915 (1980).

Respondent since July 31, 1984, has been under a Board Order to keep adequate hiring hall records.[41]

On the basis of all the foregoing, then, we adopt the judge's finding that the backpay specification properly claimed backpay past the close of the earlier hearing for all the discriminatees except Bradley and Randy Huggins.[42] However, because, under the Respondent's hiring hall rules in effect since April 1, 1984, the names of applicants who are absent from the hall when called for referral are to be stricken from the register, we shall deny backpay to any discriminatee whose name was properly stricken because of his failure to appear for referral, from the time he was marked absent until he re-signed the register. From April 1 though about October 1984, and from March 25, 1985, through July 1986, a registrant's name would be stricken if he was absent once when called. Between about October 1984 and March 24, 1985, and since August 1986, however, a registrant's name would not be stricken until he was called twice and marked absent.[43] Thus, for the latter two periods, a discriminatee's name should not be considered properly stricken unless he had been called and marked absent at least twice.

C.

The Respondent also excepts to the judge's approving the General Counsel's formula for computing backpay liability. To the extent indicated below, we find merit in this exception.

As we have noted, the General Counsel's backpay specification is based on the ''representative employee'' approach, which has long been sanctioned in Board law. Under that approach, the income a discriminatee would have earned during the backpay period in the absence of discrimination is estimated from the actual income during that period of an employee (or group of employees) with similar characteristics to those of the discriminatee.[44] In this case, the General Counsel used the average hours worked during the backpay period by a random sample of 49 individuals (''the 49'') taken from the Respondent's membership rolls as an estimate of the amount of time each of the discriminatees would have worked during that period in the absence of discrimination.[45]

The Respondent argues that the 49 are not representative of the discriminatees,[46] and thus that it was improper for the General Counsel simply to assume that, in the absence of discrimination, each of the discriminatees would have worked as much as the 49. The Respondent introduced the records of the hours of employment credited to each of the 49, and to each of the discriminatees, by the industry pension fund for a number of years before the backpay period as well as for the backpay period itself. That evidence indicates that the discriminatees (except for Andrew Huggins) worked on average considerably less than the 49 during the years 1977–1978, 1979–1980, and 1977–1980. Thus, the Respondent urges that, no matter which of these base periods is used for comparison purposes, it was unreasonable for the judge to assume that each of the discriminatees would have worked as much as the 49 during the backpay period, when they had not worked that much before. The Respondent contends that, if any backpay is due at all, it should be recomputed for each discriminatee by (1) dividing the average hours worked by that discriminatee during some base period (say, 1979–1980) by the average hours worked during the same period by the 49 and (2) multiplying the fraction so derived times the average hours worked during the backpay period by the 49. Thus, for example, if discriminatee X worked an average of 1200 hours during 1979–1980, but the 49 worked an average of 1500 hours during those 2 years, X would have worked 80 percent of the average of the 49 during that time. Consequently, if the 49 worked an average of 1000 hours during 1981, under the Respondent's method the assumption would be that, absent discrimination, X would have worked 800 hours (80 percent of 1000) during 1981, and should be awarded backpay on that basis.

The judge rejected the Respondent's contentions. He found that the General Counsel's model was consistent with Board precedent and was reasonable. He also faulted the Respondent's proposed approach for using, as a reference period, years in which the Respondent had been engaged in acts that would have adversely affected the discriminatees' work opportunities. To use the periods propounded by the Respondent, the judge reasoned, would be to estimate the earnings of the discriminatees during the backpay period on the basis of their work history during an earlier period during

[41] This case thus stands in stark contrast with *Iron Workers Local 373*, in which the union kept meticulous hiring hall records that showed the dates each registrant signed the book and was called for referral, and whether he was actually referred or was marked absent.

Member Cracraft agrees that under the circumstances of this case the General Counsel does not have the burden of establishing that the discriminatees were present in the hiring hall when out-of-turn referrals were made. She also agrees with her colleagues that this case is distinguishable from *Iron Workers Local 373* and thus does not pass on whether she would normally place this burden on the General Counsel.

[42] In so finding, we do not rely, as the judge did in fn. 17 of his decision, on Andrew Huggins' letter to Curley claiming that he had been passed over for referral by Shelvin Oates in December 1984, because that statement was hearsay.

[43] The foregoing findings are based on the Respondent's written hiring hall rules and on Weaver's testimony.

[44] See, for example, *East Texas Steel Castings*, 116 NLRB 1336, 1337–1338 (1956), enfd. 255 F.2d 284 (5th Cir. 1958); *West Texas Utilities Co.*, 109 NLRB 936 (1954).

[45] The General Counsel's methodology in selecting the sample is explained in part IV,C,1 of the judge's decision.

[46] The Respondent argues that many of the 49, unlike the discriminatees, worked as foremen or stewards (and therefore worked more regularly than the discriminatees), or worked steadily for particular contractors (and thus seldom, if ever, used the hiring hall). Notwithstanding that argument, however, the Respondent used the 49 as the comparison group in its alternative model.

which they may also have been the victims of discrimination.

We agree with the Respondent insofar as it contends that, once evidence had been presented that indicated that the discriminatees had not, in the past, worked as much as the 49, the judge should not have implicitly accepted the General Counsel's uncritical assumption that each discriminatee would have worked as much as the 49 during the backpay period. In so finding, we do not suggest that the General Counsel's approach was unreasonable, per se. The judge's task, however, is not simply to approve the General Counsel's formula if he finds it reasonable, but ''to consider whether [that] formula is the proper one in view of all the facts adduced by the parties and to make recommendations to the Board as to *the most accurate method* of determining the amounts due.''[47] Having considered both the General Counsel's model and the Respondent's alternative ''multiplier'' approach, we find the latter to be the more accurate method in the circumstances of this case.[48]

We emphatically agree with the judge, however, that it would be improper to use, as a reference period for calculating backpay ''multipliers,'' any period in which the Respondent has been shown to bear animus against the discriminatees. Even though no actual discrimination against the discriminatees has been found prior to the 10(b) period beginning in late 1980, the administrative law judge in the unfair labor practice case found that as far back as 1978, the Respondent, through its officers, threatened to get even with certain of the discriminatees—by denying them work opportunities—because of their dissident activities.[49] If we were to use any year beginning with 1978 as a base period, we would run the risk that the discriminatees' hours of work during that period, and therefore the relevant ''multipliers,'' would have been biased downward because of the Respondent's animus against them, and thus that their backpay awards would be artificially reduced, ironically, because of the Respondent's earlier treatment of them. Such a result is not to be sanctioned.[50]

We shall, instead, use as a reference period the years 1976–1977, which is the most recent 2-year period before the onset of the Respondent's threats to deny referrals to the discriminatees.[51] We have reviewed the Respondent's pension fund data, and we find that 12 of the 49[52] worked no hours in either 1976 or 1977. We therefore shall exclude them from the sample. The remaining 37 members of the sample worked an average of 1462 hours in 1976 and an average of 1378 hours in 1977, or an average of 1420 hours per year for the 2-year period. During the same period, the discriminatees worked the following average hours, and percentages of the hours worked by the 37 remaining sample members:

	Avg. Hrs.	*Percent of Sample*
Bradley	1642	116
Coates	717	50
Gray	1512	106
A. Huggins	1838	129
R. Huggins	750	53
Poorman	1166	82
Scott	1117	79

We shall use the percentages in the right-hand column to estimate the hours the discriminatees would have worked, absent discrimination, during the backpay period.

We shall not, however, use the ''multiplier'' approach in the case of Rita McMillan. McMillan first worked out of the Respondent's hiring hall in 1980, well after the Respondent began threatening to discriminate against dissident members. Thus, we are unable to compare McMillan's work history with that of other employees during a period free of animus against union dissidents, as we have found appropriate to do for the other discriminatees. Lacking any other objective method of estimating the hours McMillan would have worked, absent discrimination, during the backpay period, we perceive no reason not to use the General Counsel's ''representative employee'' approach,

[47] *American Mfg. Co. of Texas*, 167 NLRB 520 (1967) (emphasis added). In this regard, we note that *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964); *Bagel Bakers Council v. NLRB*, 555 F.2d 304 (2d Cir. 1977); and *NLRB v. Iron Workers Local 378*, 532 F.2d 1241 (9th Cir. 1976), cited in part IV,A of the judge's decision, do not, contrary to the judge, deal with the Board's scope of review of the General Counsel's proposed backpay formula, but instead with the courts' review of backpay formulas, or other remedies, employed by the Board.

[48] The ''multiplier'' approach has been used by the General Counsel, with Board and court approval. *Boyer Ford Trucks*, 270 NLRB 1133, 1137–1138 (1984), enfd. in relevant part 757 F.2d 961 (8th Cir. 1985).

Our dissenting colleague objects to the ''multiplier'' approach as speculative, because it is based on the assumption that, absent discrimination, the discriminatees' work patterns during the backpay period would have approximated their work histories during the reference period. Our approach is, of course, somewhat speculative. It is less so, however, than the General Counsel's method, which assumes that, absent discrimination, the discriminatees as a group would have worked as much during the backpay period as the 49, even though they had not done so before. Judging the future by the past is not an infallible method, but it is to be preferred over assumptions that, in the circumstances of this case, are unsupported.

[49] See 271 NLRB at 790–792.

[50] *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167, 171 (1983), enfd. in relevant part 748 F.2d 1001 (5th Cir. 1984), cert. denied 470 U.S. 1085 (1985). As the judge noted, Sec. 10562 of the General Counsel's Casehandling Manual directs that earnings and hours during periods of ''turmoil and disturbance'' immediately preceding an unfair labor practice must not be used in computing averages on which backpay is to be based.

The Respondent's argument that we cannot consider any of its actions prior to the 10(b) period in selecting a reference period is without merit. *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB at 171.

[51] Ibid.

[52] Prince, B. Whitfield, W. Johnson, Roberts, Rush, Golden, W. A. Jones, Harris, English, Hall, Flatau, and D. Davenport.

and we find that, with regard to McMillan, the judge correctly approved the use of that approach.[53]

Because the 12 individuals who worked no hours during 1976–1977 have been excluded from the sample, their hours should not be included for comparison purposes during the backpay period. Therefore, the average hours worked by the 49 during the backpay period cannot be used in computing backpay. Only the hours of the remaining 37 may be used for that purpose. Thus, the ''multipliers'' should be applied to the recomputed average hours for those 37 individuals in the sample for each quarter of the backpay period.[54]

D.

The Respondent excepts to the judge's finding that the backpay periods should be kept open until the Board issues its Supplemental Decision and Order.[55] Although we agree with the judge that the Respondent's backpay liability did not end at the close of the hearing in this case, because it has not been shown that the Respondent has ceased to discriminate against the backpay claimants, as a practical matter there is no evidence in the record before us that would enable us to compute backpay for the period following the hearing. Therefore, we shall assess backpay only in accordance with the amended backpay specification, with the modifications set forth above. However, the General Counsel may bring additional backpay claims for the period following the hearing if, in his discretion, he finds that such claims are warranted.

III.

In summary, we adopt the judge's findings and conclusions except as indicated above. Our principal modifications of his findings are that (1) backpay should not begin for any discriminatee until the date of the first proved act of discrimination against him or her; (2) an individual who received or was offered a referral, or was called for referral, marked absent, and properly stricken from the register after April 1, 1984, should not accrue backpay until he or she reregistered for referral; and (3) the ''multipliers'' derived in part II,C, above, should be applied only to the average hours worked during the backpay period by the individuals in the General Counsel's sample who also worked in 1976 and/or 1977. Those modifications, however, necessarily entail extensive recomputations of each of the backpay awards. We therefore shall remand the case to the Regional Director to perform the necessary recomputations and to prepare an amended backpay specification.

ORDER

The Respondent, Laborers Local No. 135, its officers, agents, and representatives, shall make Rita McMillan whole by paying her $27,161.73 in backpay and $2262.65 in pension credits, plus interest on both amounts to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In all other respects, the case is remanded to the Regional Director for Region 4 for revisions of the amended backpay specification as indicated above.

MEMBER DEVANEY, concurring in part and dissenting in part.

Although I agree with the majority in other respects, I would adopt the judge's backpay formula for the reasons set forth below. Additionally, I would not impose any requirement on the General Counsel here to establish that any discriminatees were present in the hiring hall when passed over for referral. In this regard, as I stated in my dissent in *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648 (1985), I do not believe such a limitation on backpay entitlements is appropriate because there should be no legal burden on the General Counsel to demonstrate that discriminatees were in a hiring hall when out-of-order referrals took place. On the particular facts here, my colleagues distinguish *Iron Workers Local 373* and find that the General Counsel has no burden of showing the presence of the discriminatees in this case. Thus, I agree with my colleagues that there should be no burden placed on the General Counsel, but for the reasons stated in my dissent in *Iron Workers Local 373*.

Similarly, in *Iron Workers Local 373*, I further stated that I would not require the General Counsel to show that discriminatees performed the futile act of shaping a respondent's hiring hall on a particular date when they were passed over before they became eligible to receive any backpay. The facts here establish that Rita McMillan, although referred by the Respond-

[53] As we have stated, McMillan was referred on October 1, 1983, and did not register thereafter. She is therefore not entitled to backpay for any quarter after the third quarter of 1983. We shall revise the portion of the judge's recommended Order regarding McMillan to eliminate claims for periods after October 1983.

For the reasons stated by the majority in *Iron Workers Local 373* at fn. 29, we reject our dissenting colleague's contention that it was futile for McMillan to shape the Respondent's hiring hall.

[54] On remand, the Regional Director also shall make certain that each discriminatee's backpay period begins no earlier than the first instance of discrimination found in part II,A, above.

The Respondent argues that we cannot treat Gray and McMillan as we do the other discriminatees, because Gray and McMillan were ineligible to receive referrals to Bechtel, one of the largest employers of laborers in the Respondent's jurisdiction. We reject that argument. Although Gray and McMillan could not have gone back to work at Bechtel, there is no evidence in the record that, had either of those two discriminatees been at the head of the list to be referred when a Bechtel job opened, he or she would have been stricken from the book and required to reregister. We therefore infer that, had such an occasion arisen, the first eligible individual on the list would have received the Bechtel referral and (in the absence of discrimination) Gray or McMillan would have been sent to the next job with a contractor other than Bechtel. Thus, it appears that Gray and McMillan's ineligibility for Bechtel positions would have served primarily to redistribute job openings among the registrants for referral, but (again, absent discrimination) would not have diminished those discriminatees' earnings potential significantly.

[55] The judge relied on *Florida Steel Corp.*, 273 NLRB 889 (1984).

ent in October 1983, had been passed on three occasions. I therefore disagree with the majority's cutting off McMillan's backpay after the third quarter of 1983 because she had not reregistered after the referral in October of that year.

Finally, contrary to my colleagues, I would affirm the judge in extending the backpay period to cover posthearing violations. Consistent with our placing the burden of uncertainty on the wrongdoing Union, I would conclude, absent evidence that the Union was complying with the original Board Order, that it was not, and would remand to develop the record on this issue.

As to the majority's backpay formula, I concede that it is reasonable. However, although the majority sets forth a reasonable formula, they do not persuade me that their formula is any more reasonable than that applied by the judge. In this circumstance, I am unwilling to reject the judge's formula in favor of the one used by the majority.

Specifically, the judge applied the commonly used representative employee formula derived from the General Counsel's backpay specification. Under this method of computation, the discriminatees' backpay is determined simply by reference to the hours worked of a representative sample of employees during the backpay period. The majority, in agreement with the judge, does not contest the representative sample used. The majority's formula compares the work histories of each individual discriminatee during the 1976–1977 period with those of the representative group in order to arrive at a multiplier to be used to determine the discriminatees' backpay for the period 1980–1987.

The majority's formula is thus more specific to the individual discriminatees' work histories. However, it rests on the speculative assumption that past work history is an accurate predictor of future work history. This may be the case in some situations. But such an assumption is not a fact. Furthermore, I believe the assumption is less compelling where, as here, the timeframe analyzed by the majority is remote in time from the relevant backpay period of inquiry. In other words, I am not persuaded that a discriminatee's work history here is useful in predicting how much that discriminatee would have worked a decade later. In this regard, the majority goes back beyond the period the Respondent's witness used in making his calculations in order to counter the argument that the discriminatees' work histories during the later time period immediately preceding the backpay period were tainted by the Respondent's documented discrimination prior to the 10(b) period. Thus, the majority goes back to a period that is more remote than that requested by the Respondent to a period that the compliance officer testified to be too remote for effective use as a predictor of potential earnings during the post-1980 backpay period.

In sum, the judge's formula is clearly not arbitrary or based on completely unsupported assumptions, as the majority suggests. Rather, it is based on the well-established ''representative employee'' method of computation that is reasonable and appropriate, especially in the circumstance of a lengthy backpay peirod. It further has the added benefits of being simple, easy to apply, and accurate for the reasons stated in the judge's decision. Finally, it has the benefit of allowing the Board to reach a decision without remanding the case for further computations. In contrast, the majority's revised formula would require a remand for further recomputations. If, in fact, the majority's formula was clearly more accurate, I would reluctantly agree to a remand for recalculation of backpay amounts due. However, for the reasons stated above, I am not persuaded that the majority's formula is more reasonable. Accordingly, I respectfully dissent from my colleagues' decision.

Daniel E. Halevy, Esq., for the General Counsel
Robert C. Cohen, Esq. (Markowitz & Richman), of Philadelphia, Pennsylvania, for the Union.
Judith B. Chomsky, Esq., of Philadelphia, Pennsylvania, for the backpay claimants.

SUPPLEMENTAL DECISION

NORMAN ZANKEL, Administrative Law Judge. These backpay cases were heard on 19 hearing dates between December 1, 1986 and August 5, 1987,[1] at Philadelphia, Pennsylvania.

This supplemental hearing was conducted to determine the amount of backpay and other benefits due under a 1984 Board decision (271 NLRB 777), as enforced by the United States Court of Appeals, Third Circuit by judgment order, January 24, 1986 (*NLRB v. Laborers Local 135*, Civil No. 85-3197).

At the hearing all parties had opportunity to introduce and meet material evidence and to argue orally on the record. All parties filed posthearing briefs.

On the record before me, and from my observations of the demeanor of witnesses, and after careful consideration of the briefs, I make the following

FINDINGS OF FACT

I. THE ISSUES

Two principal issues govern disposition of the proceedings. They are:

> A. For what period of time is each discriminatee entitled to receive backpay and other aspects of the Board's remedy?

[1] On August 5, 1987, the hearing was not closed. Instead, it was adjourned indefinitely to permit the backpay specification to be made current. After the parties completed the necessary undertakings, the hearing was closed by written order on December 1, 1987 (see A.L.J. Exh. 4). The parties' briefs were filed in February 1988.

B. What formula should be used to calculate the backpay due each discriminatee?

I shall find the periods of time and formula proposed by counsel for the Board's General Counsel in the backpay specification as finally amended (G.C. Exhs. l(d) and 59)[2] appropriately establish the remedy in the cases at bar.

II. BACKGROUND

In relevant part, the Board found the Union discriminated against Wilson Bradley, Harold Coates, Fred Gray, Andrew Huggins, Randy Huggins, Rita McMillan, Roy Poorman, and George Scott by engaging in a pervasive and continuing pattern of unlawful conduct because of their internal union politics by failing and refusing to refer these individuals in proper order from its hiring and referral hall.

The Board's decision issued July 31, 1984. The Board also found the discrimination continued for many months and involved bypassing the eight discriminatees in favor of all other persons registering for job referrals. Also, the Board found that ''Literally hundreds, if not thousands, of discriminatory referrals took place within the time period framed by the applicable 10(b) dates and the date of the . . .'' underlying unfair labor practice hearing.

The Board issued a multifaceted remedial order. In salient part, the Union was ordered to: (a) maintain and operate its exclusive and nonexclusive job referral system in a nondiscriminatory manner based on objective criteria and standards; (b) keep and retain permanent records of its hiring and referral operations for 2 years from the date of decision in such form that will be adequate to disclose fully the basis on which each referral is made and make those records available to the Board's Regional Director on request; and (c) make each discriminatee whole from the date of the discrimination until the time the Union ''ceases its unlawful conduct by properly referring him or her to employment, less net interim earnings'' (277 NLRB at 783).

Determination of the precise number of indivduals given out-of-turn referrals in preference to the discriminatees, the dates of their employment, rates of pay, and ''related issues'' were left by the Board to the instant compliance proceedings (271 NLRB at 781).

III. LENGTH OF THE REMEDIAL PERIOD

A. *The Board's Order*

The Board found the Union discriminated against the discriminatees during the time periods specified as follows:

W. Bradley: Between December 5, 1980 and August 21, 1981;

H. Coates: ''At Least'' between January 31 and June 17, 1981; and between July 6–13, 1981; and between November 24, 1981 ''and at least'' February 10, 1982;

F. Gray: Between April 24 and June 24, 1981; ''and since'' March 5, 1982;

A. Huggins: Between December 5, 1980 and April 9, 1981;

R. Huggins: Between February 27 and May 19, 1981;

R. McMillan: Between April 25 and June 24, 1981; August 5–26, 1981; October 13-November 19, 1981; and ''since March 5, 1982;''

R. Poorman: Between December 5, 1980 and July 13, 1981; and ''since July 16, 1981;

G. Scott: ''after November 24, 1981.''[3]

B. *Positions of Parties*

General Counsel claims the remedial period for W. Bradley and R. Huggins begins and ends on the dates set forth above. However, General Counsel asserts the compensable time periods for H. Coates, F. Gray, R. McMillan, R. Poorman, and G. Scott are open-ended. General Counsel's position is based on the Board's use of the word ''since'' for Gray, McMillan, and Poorman; the word ''after'' for Scott; and the phrase ''at least'' for Coates. Such use, the General Counsel contends, signifies the Board's intention to keep open the backpay periods for those five discriminatees pending evidence that the Union had stopped discriminating against them or that any discriminatee had voluntarily done something to make him or her ineligible for further referral.

Finally, the General Counsel seeks to expand the backpay period of A. Huggins. As shown above, the Board definitively established A. Huggins' period as between December 5, 1980 and April 9, 1981. General Counsel claims the backpay period for A. Huggins should extend to April 9, 1987, the date Mr. Huggins was declared eligible for supplemental social security income based on a finding he is physically disabled from performing work to which the Union makes referrals. General Counsel's position regarding A. Huggins is founded on information that this discriminatee gave the Board's Regional Office personnel during the compliance investigation which preceded the instant hearing.[4]

The Charging Parties agree with General Counsel's contentions concerning the backpay periods for all discriminatees, except A. Huggins. The Charging Parties claim the award of supplemental social security income benefits should not operate to close A. Huggins' backpay period in the absence of direct evidence that his physical disability actually caused him to decline work. Specifically, the Charging Parties rely on evidence which shows that A. Huggins was working as a laborer for a unionized contractor within the Union's jurisdiction at the time his disability award was made.[5] Charging Parties seek to continue A. Huggins' backpay period running at least to the instant hearing.

The Union contends no backpay period for any discriminatee can be expanded beyond the precise dates set forth by the Board under any circumstances. The Union ar-

[2] As originally issued, the backpay specification contained a fourth case (4-CB-4311) consolidated with the three cases identified in the caption of this decision. I approved a withdrawal request and granted General Counsel's motion to dismiss and sever Case 4–CB–4311 from the instant cases on April 23, 1987, the 12th hearing date (see Tr. 1612–1626 and A.L.J. Exh. 1).

[3] These time periods including the quoted phrases have been abstracted from 271 NLRB at 781, 782.

[4] A. Huggins did not appear as a witness before me. Instead, Robert Curley, Regional Office compliance officer, testified this discriminatee provided information which caused the Regional Office authorities to conclude the Union continued to pass over A. Huggins in referrals after April 9, 1981. A separate discussion concerning A. Huggins' backpay period is contained in section III,C(7), below.

[5] At the time of award, A. Huggins was working for Joseph A. Cornell (R. Exh. 20).

gues that the Board expressly left it for this supplemental proceeding to establish instances of specific out-of-turn referrals; that the burden to do so rests with General Counsel; and that burden has not been sustained because the record is bare of evidence of out-of-turn referrals for each discriminatee.

Also, the Union claims that if it is possible to increase the length of any backpay period in this case beyond the dates previously decided by the Board, all such periods must close on April 1, 1984, when the Union changed its referral system to require persons seeking referral to be present in the referral hall. The Union argues evidence shows that only Coates, among all the discriminatees, registered for referral under the new rules, but did not appear in the hall for referral (See R. Exh. 36).

Finally, the Union asserts that Bradley and Scott are entitled to no backpay at all because there is no evidence of discriminatory conduct within the period prescribed by Section 10(b) of the National Labor Relations Act (the Act).[6]

C. *Facts, Discussion, and Analysis*[7]

The General Counsel acknowledges ''the Board's Order contemplated a determination of the precise number of . . . out-of-turn referrals during the backpay period'' (posthearing brief, p. 11, fn. omitted). However, General Counsel maintains the state of the Union's recordkeeping with respect to referrals makes this task impossible, and such a situation justifies keeping the backpay periods open-ended until the Union could prove it ended its discriminatory conduct toward each discriminatee.

Evaluation of this position requires recourse to some additional Board findings in the underlying unfair labor practice case; a review of the record before me regarding the condition, and Union's maintenance, of the referral records; and Curley's efforts, during the compliance investigation, to establish the extent to which out-of-turn referrals were made (if at all) with the precision sought by the Board.

1. Prior findings

The Board found, among other things, the Union's ''own written rules and standards governing operation of its hiring hall at times required that . . . written records concerning the operation of the hiring hall be kept and maintained.'' Also, the Board agreed with Administrative Law Judge Thamas A. Ricci's finding concerning how the Union implemented those requirements. Judge Ricci concluded the Union ''simply ignored its hiring hall system and that its authorized agents, in control of distribution of jobs, satisfied their whims and prejudices in total disregard of Board law.'' (271 NLRB at 795, adopted by the Board at 780).

The Board also found that the Union's operation of its referral hall made the underlying unfair labor practice proceeding one of those ''exceptional cases'' in which a specific finding of ''widespread and pervasive'' discrimination makes particularized proof of each instance of discriminatory conduct impractical and unnecessary (271 NLRB at 781).

Certain of Judge Ricci's findings, which the Board adopted, are relevant to an understanding of General Counsel's stated rationale for the claim the backpay periods are open-ended. Judge Ricci found ''There was a regular book maintained all the time where the members signed in after finishing any one job . . . . There was a time when, for one reason or another, the book was kept upstairs in the union building and the men signed what was called a yellow sheet instead. This was a loose sheet, renewed every day or week; the names were to be transferred by the secretaries into the regular book, but there is no real proof that this was always done if only because it was admitted many of the yellow sheets disappeared.'' (271 NLRB at 792).

Judge Ricci also found that ''nothing can change the reality that most of the work, as the 'book' and 'yellow sheets' . . . show was in the hands of the Union to give or withhold.'' Further, Judge Ricci found the Union's ''business manager, was really the one who decided how the referral system should be run every day. He was literally in charge of the entire operation.'' (271 NLRB at 792).

Finally, Judge Ricci found that employers who used the Union's referral system also were free to hire ''off the street, by direct recall of older employees, or even by hiring pure outsiders.'' In this connection, the judge noted, however, that, ''Without question the amount of work resulting from direct hiring as distinguished from union referral hall was relatively very minor.'' (271 NLRB at 792).[8]

2. The Union's referral records

The referral ''book'' (C.P. Exhs. 2, 5, 7) and the ''yellow sheets'' (C.P. Exhs. 3, 4), referred-to by Judge Ricci, continued to be the source referral documents after the underlying unfair labor practice hearing and into the backpay periods established by the Board. The ''book'' shows that names of some individuals who signed up for work up to March 29, 1983, had been striken, but no notation was made to indicate the reason; and after that date no referral activity whatever was recorded (see C.P. 2, p. 135).

John Weaver, the Union's secretary-treasurer, testified extensively before me concerning the referral hall operation and use of the Union's records after Judge Ricci's hearing. Weaver testified he was in charge of the referral hall during all times relevant to the instant proceedings.

Weaver could not recall whether referrals ever were made from the ''book'' after March 29, 1983. He testified that the yellow sheets replaced the book in November 1983. According to Weaver, the change was necessary because the referral book itself was removed to, and was then located in, the offices of the Union's attorney. The yellow sheets (C.P. 4)

[6] This section is the Act's statute of limitations which prohibits making unfair labor practice findings based on events which occurred more than 6 months before a charge is filed. I find no further need to discuss the Union's function 10(b) defense because the Board clearly identified time periods which Bradley and Scott suffered discriminatory treatment (see sec. II-A, above). I am bound by those Board findings. See *Waco, Inc.*, 273 NLRB 714 fn. 14 (1984). In this context, I conclude the 10(b) defense is a restatement of the Union's position that General Counsel was required to prove specific instances of out-of-turn referrals in the instant proceedings.

[7] The operative facts are substantially undisputed. Those reported here are a composite of witnesses' uncontradicted testimony, documentary evidence, admissions and precedential findings which arise from the underlying unfair labor practice decision.

[8] I conclude these findings of Judge Ricci, undisturbed by the Board, are an important base of comparison between how the referral hall was operated before and after the Board's decision, in light of General Counsel's contention the referral records were no more amenable to reconstruction after the Board's decision than before its issuance. Also, the last-stated finding is germane to the Union's claim (discussed below) that the backpay formula is not based on a representative sample of workers.

show persons wishing referrals signed in on them through March 28, 1984.

The Union operated under the referral rules in effect during Judge Ricci's hearing (which closed June 5, 1982) until April 1, 1984. Those rules provided that referrals would be made in the order individuals signed their names (271 NLRB at 794).[9] Nonetheless, Weaver testified he could not remember whether the Union followed that procedure in 1983. However, Weaver did acknowledge referrals were made on a first come, first serve basis during this period, which encompassed time before the effective dates of the Union's April 1, 1984 rule change by which those looking for referrals needed to be present in the Union's hall (see sec. III,B, above).

Weaver first claimed the yellow sheets were ''just a sign-in sheet,'' and that no one was referred to jobs from those sheets. Shortly after so testifying, he equivocated and asserted referrals *may have* been made from the yellow sheets (compare Tr. 1984 to Tr. 1987). The yellow sheets themselves contain no written indication whatsoever whether referrals were made from them. The sheets show only who signed them. But they do not show who was referred or when such referrals were made between November 1983 and March 28, 1984. Weaver also testified that the names which appear on the yellow sheets never were transferred to the referral book. Finally, Weaver conceded the yellow sheet (specifically, C.P. Exh. 4) could not be used to determine whether anyone was referred (Tr. 1988).

There is evidence to support a conclusion the yellow sheets served no purpose in referrals. For example, a record from the Union's health and welfare fund (C.P. Exh. 37) as to Drew Davenport shows that he changed employers between November and December 1983. Davenport's name does not appear on the yellow sheets. Weaver was not questioned about this matter.

Davenport's situation tends to show that confusion surrounded the referral operations between November 1983 and March 1984. If Davenport was referred to Bechtel in December 1983, the referral rules were violated because his name was not on the yellow sheets and could not have been on the ''book,'' then absent from the Union's hall. If Davenport obtained his new job in December 1983 without a referral, such condition underscores the General Counsel's professed inability to trace the referral operations through the backpay period.

The Union resumed using a referral book in April 1984. In July 1986, many of the pages in that book (C.P. Exh. 5) were ripped out by unknown persons. (Weaver claimed the book was damaged in April 1986. I do not consider the date pages were ripped from the book significant). The Union replaced the ripped book with another (C.P. Exh. 7) on August 1, 1986. This new book continued in use into the time of the instant hearing.

The Union also maintained a ''Daily Job Referral Activity List'' (C.P. Exh. 6) between November 5, 1984 and May 21, 1985. The records were supposed to reflect the basis for any out-of-turn referrals and substantiate who was present for referral in Union's hall; yet, as implemented, contain no references to such reasons (Tr. 2379–2380). Weaver admitted no other record was devised to generate this out-of-turn referral information after this list was discontinued in May 1985. The Union, in its brief, argues no conclusion adverse to it should be made from the discontinuance because the Union advised the Board's Regional Director of that event and no objection was made by him. I reject the Union's argument. Whether or not the Regional Director acquiesced in the Union's action is irrelevant, because the Board's decision makes it solely the Union's obligation to maintain sufficient records which would show specific instances of out-of-turn referrals. Weaver's testimony indicates this was not done.

The record contains the following (not necessarily all-inclusive) evidence of the Union's implementation of the referral hall, and condition of its referral records, after August 1, 1986, the advent of the most current referral ''book.''

Weaver asserted that the new ''book'' (C.P. Exh. 7) was the only document in which entries were made to reflect the Union's referrals after August 1, 1986. Presumably, that referral book should have been a reliable source from which referrals could be traced.

However, a comparison of the entries in the referral book to the entries in Bechtel's log book of laborers referred to it (G.C. Exh. 57) between January 13, 1986 and June 1, 1987, makes it clear the Union's referral book did not provide a complete picture of referrals after Augsut 1, 1986. For example, Bechtel's log book shows referrals of the following persons: R. Wilson, E. Garrett, and T. E. Jackson. Weaver could not locate a record of those referrals in the ''book.'' When he tried to account for the referral book's deficiency, Weaver said he ''cannot explain'' (Tr. 2041) why R. Wilson's referral was not reflected in the referral book; and speculated that E. Garrett and T. E. Jackson were new initiates. In this connection, Weaver testified ''In order to fill the contractor's request, a new person may have been initiated into the Union, and would not be required to sign the (referral) book'' (Tr. 2044).

Weaver's testimony provides other evidence that the most recent union referral book is incomplete and misleading. The name of M. A. Fisher was crossed off the referral book (C.P. Exh. 7, no. 164). No reason appears. Weaver testified Fisher's name was stricken at her own request while waiting for a particular Bechtel job. Weaver further testified he honored Fisher's request until the job became available and then referred Fisher to Bechtel without recording that the referral had been made (Tr. 2047–2048; also see testimony and records relating to L. Samuel, Tr. 2049–2050).

As reported above in section III,C(l), Judge Ricci's finding that direct hiring by employers was ''very minor'' as distinguished from their hiring through the Union's hiring hall remains undisturbed. No evidence was offered to me to refute this finding. Accordingly, I have used this finding to determine whether the record before me contains evidence of specific out-of-turn referrals of the type the Board had found unlawful.

Specifically, the dates on which discriminatees Coates, Gray, A. Huggins, McMillan, Poorman, and Scott signed up for referrals have been ccnpared to the dates union health and welfare records show certain other laborers began working at Bechtel jobs. Underlying this comparison was the unrefuted assumption that most of the Bechtel work was de-

[9] Of course, the Board's findings reflect agreement with Judge Ricci's conclusions that the rule requlary was ignored.

rived by laborers from union referral.[10] The comparison leads me to conclude the Union continued to bypass these discriminatees for some time in the backpay period. I also find that situation tends to support General Counsel's claim the backpay period for these individuals should be open-ended.

All examples of apparent bypassing, cited below, occurred before the Union's first effort to change its rules became effective on April 1, 1984. Thus, there is arguable merit to the Union's contention that no backpay claim should be extended beyond that date. I have considered all the Union's evidence and argument concerning its good-faith efforts to operate its referral hall fairly and to comply with the Board's directive to cease engaging in the unlawful discriminatory conduct and establish and maintain its referral records in such a condition as would allow accurate verification of compliance.

Clearly, the Union's counsel advised the Union to make changes designed to avoid the pitfalls which gave rise to the underlying unfair labor practice findings. However, the instant record as a whole contains evidence which, in my view, subverts those amelioration efforts. Weaver admitted the referral book, alone, was insufficient to reconstruct the actual referral process (Tr. 2008; 2025–2026). He candidly and repeatedly acknowledged that task could not be done without the background information he virtually singularly possessed but remained unrecorded in Union records. Also, the record is bare of any reliable evidence of the occurrence of some event which would toll the backpay period for any of the discriminatees apparently bypassed during the backpay period.[11] In these circumstances, I conclude the specific instances of activity which took place (as shall be reported immediately below) as long as 3 years after December 5, 1980, the beginning of the backpay period, and which was identical to the conduct the Board found unlawful override the later legal advice designed to end the improper conduct. Inasmuch as no direct exculpatory evidence was produced by the Union, I reject its effort to limit the backpay period to any time shorter than set forth in the backpay specification as finally amended.

The record reveals the following examples of apparent bypassing of the discriminatees within the backpay period.[12]

(a) E. C. Webb: H & W records show a fund contribution entry from Bechtel for this laborer on September 25, 1983. Webb's name does not appear on the Union's ''book'' in use at that time (C.P. Exh. 2).

Coates, Poorman, and Scott signed the ''book'' on July 19, 1983; Gray signed on August 3, 1983; and McMillan did so on September 21, 1983. These discriminatees were signed for referral before Webb apparently began the Bechtel job. Why Webb, who had not signed the ''book'' started at Bechtel when the discriminatees still were waiting is unexplained.

(b) C. Patterson: H & W records show a fund contribution entry from Bechtel for this laborer on January 1, 1984. Patterson's name appears on the yellow sheet (C.P. Exh. 3) on January 4, 1984. However, Coates, Poorman, and Scott signed for referral on July 19, 1983. (Coates had a 1-day job for which H & W contributions were made on or about January 1, 1984. Under the referral rules, Coates was still eligible for referral based on his July 1983 registration. Eligibility was lost after 3 days at work after referral). Gray signed on August 3, 1983.

Weaver claimed Patterson was referred as a steward. Such status would have entitled Patterson to referral preference. No supporting evidence of Patterson's stewardship is in the record. For this reason, and others to be discussed in subparagraph (g) below relative to V. A. Corbin, I conclude reliance upon Weaver's claim with respect to Patterson would be misplaced. Accordingly, I find Patterson's Janaury 1984 referral shows the discriminatees were bypassed within the backpay period.

(c) E. Williams: H & W records show a fund conribution entry beginning January 1, 1984. Williams' name appears on the ''book'' on November 15, 1983. At that time, as shown above, Poorman and Scott were eligible for referral by virtue of their registration on July 19, 1983. Williams' referral before them remains unexplained.

(d) W. E. Johnson: H & W records show a fund contribution entry by Bechtel for February 26, 1984. Johnson's name does not appear on the yellow sheet in use at that time (C.P. Exh. 3).

Coates, McMillan, and Poorman signed the yellow sheet on January 3, 1984; Scott signed it on January 4, 1984: and Coates and Scott signed again on February 2, 1984; while A. Huggins signed on January 27 and on February 6, 1984. The record contains no explanation for Johnson's referral at a time when the listed discriminatees appeared on the yellow sheets at a time quite current with his February 1984 referral.

(e) C. Tillar: H & W records show a fund contribution entry from Bechtel for February 26, 1984. Tillar's name does not appear on the yellow in use at that time.

Coates', A. Huggins', Poorman's, and Scott's registrations in January and February 1984, (previously reported) reflects they were awaiting referral at the time Tillar apparently was referred to Bechtel in February. the record contains no explanation for that situation.

(f) O. Coleman: This laborer signed the ''book'' on June 6 and August 4, 1983. H & W records show fund contributions for him from the employers between October and December 1983. Because it appears Coleman worked more than 3 days for each employer during that 3-month period, his name should have been stricken from the ''book.'' Nothetheless, H & W records show fund contributions for Coleman again began by yet a different employer on February 29, 1984. Thus, Coates, Poorman, and Scott who had signed for referral (as reported above) on July 19, 1983; and Gray who signed on August 3, 1983, appear to have been bypassed by Coleman's presumed referral in February 1984.

(g) V. A. Corbin: This laborer signed the ''book'' on September 30, 1983. H & W records show fund contributions for Corbin from an employer in January 1984. Once again, it ap-

[10] I recognize this assumption contains the risk of an undetermined margin of error. However, in view of Judge Ricci's finding, the number of persons in the sample of those who received Bechtel work, and the incomplete and misleading state of the referral records, I consider the assumption justified.

[11] As earlier noted, General Counsel and Charging Parties disagree on the termination date of A. Huggins' backpay. I shall discuss this issue separately below.

[12] Information concerning employers of the nondiscriminatees whose assumed referral comprised the apparent bypass was derived from health and welfare (H & W) records (G.C. Exh. 37). The health and welfare fund is an entity separate from the Union. Thus, the H & W records are not the Union's. These records, however, may be (and have been) used to identify for whom laborers worked and approximate work dates. It is materially noteworthy that the Union's referral records do not show either the date when the referrals were made or the date when the person referred actually started to work.

pears Coates, Gray, Poorman, and Scott were bypassed for the January referral because they signed the ''book'' in 1983 on dates (as indicated above) before Corbin signed it.

Weaver asserted Corbin was entitled to priority referral consideration because he was a union steward. However, there is absolutely no documentary evidence to support that assertion. I find Weaver's steward testimony unconvincing and unreliable. That testimony was imprecise. Weaver first claimed there was only one steward on any particular job. But he equivocated when he was confronted with the situation of J. Vaughan, whom Weaver claimed also had been referred as a steward. Apparently, Vaughan worked together with Corbin at the job Corbin had in 1984. After learning this during his testimony, Weaver altered his position regarding stewards. Then, he opined Corbin and Vaughan may have been stewards for different subcontractors on a single project which was so large that multiple employers were involved.

I recognize that Weaver's explanation is not outside the realm of possibility. However, his assertions are unsubstantiated by documents or testimony of other persons. these factors, together with Weaver's own uncertainty of the events, lead me to conclude there is insufficient evidence to effectively refute the evidence that Corbin's January 1984 referral shows certain discriminatees were bypassed.

(h) E. Council: This laborer signed the ''book'' on September 11, 1982 and May 26, 1983. H & W fund contributions are shown from one employer on May 22 and June 1, 1983 (G.C. Exh. 42); and from another employer on various dates from September 25 until November 1, 1983.

Coates and Scott signed the ''book'' on December 13, 1982; and again on July 19, 1983, together with Poorman. they were waiting for referral in September 1983.

Council again signed for referral, this time on the yellow sheet, on November 21, 1983. H & W fund contributions appear on his behalf from Bechtel on February 26, 1984.

As shown in subparagraphs (c) through (e) above, Coates, Gray, A. Huggins, Poorman, and Scott were still awaiting referral based upon their several registrations between July 1983 and February 1984. No explanation for Council's February 1984 referral over these discriminatees appears in the record.

(i) D. Davenport: As previously reported, Davenport changed jobs between November and December 1983. H & W records show it was Bechtel that made a fund contribution for him in December. Davenport's name does not appear on the yellow sheets. There is no apparent explanation for Davenport's November or December 1983 referral to Bechtel at a time when at least Coates, Gray, Poorman, and Scott were still waiting for referrals based upon their July, August, and September 1983 registrations reported above.

(j) M. DiCastenado: H & W records show fund contribution entries for this laborer by John McQuade company from July 31 to October 1, 1983; and by Bechtel beginning October 1, 1983.

As shown above, Coates, Gray, A. Huggins,[13] Poorman, and Scott had signed for referrals before McQuade stopped making contributions and before Bechtel began to make them.

There is no indication that DiCastenado signed for referral. Even if he had signed, Coates, Gray, A. Huggins, Poorman, and Scott clearly registered before DiCastenado's Bechtel referral on or about October 1, 1983.

(k) W. Golden: H & W records show fund contribution entries for this laborer from R. M. Shoemaker Co. in September and October 1983; W. L. Lotz, Inc., on October 1 and November 1, 1983; and then Bechtel beginning December 25, 1983. Golden signed the ''book'' on October 28 and November 14, 1983.

Golden's Bechtel referral appears to have bypassed Coates, Gray, Poorman, and Scott, each of whom has been shown above to have registered both before Golden's October and November 1983 registrations and the time he apparently was referred to Bechtel.

Weaver speculated Golden's referrals may have been as steward. However, I consider this claim unreliable (see my discussion concerning stewards in subparagraph (g) above).

(l) J. McKinzy: H & W fund contributions were made for this laborer between July and November 1, 1983 by R. M. Shoemaker Co., and immediately after that date by Bechtel.

McKinzy's Bechtel referral appears to have bypassed Coates, Gray, Poorman, and Scott, each of whom registered for referral before November 1, 1983 and were still waiting for referral on that date. This Bechtel referral remains unexplained.

(m) W. Prince: H & W fund contribution entries appear on May 27, 1983 for work of this laborer at Depoli Co.; and on intermittent dates between August 1, 1983 and February 26, 1984, at which time Bechtel reported fund contributions for him. Later, as the records show, fund contributions once again were made for Prince until December 1985. Prince had registered on the yellow sheet on November 29, 1983. The previously reported registration date of July 19, 1983 for Coates, Poorman, and Scott which fell before Prince's November 1983 registration shows these discriminatees apparently were bypassed by Prince's presumed referral to Shoemaker on or about August 1, 1983.

(n) B. Whitfield: H & W records show fund contribution entries for this laborer on December 27, 1983 from McKinney Drilling Co.; and again by a different employer, Near Contracting Co., on December 30, 1983. Contributions by Near Contracting continued through November 29, 1985.

Whitfield signed a yellow sheet on January 4, 1984. However, since Coates, Poorman, and Scott signed for referral on January 3, 1983; and Gray signed on August 3, 1983, the referral of Whitfield to Near Contracting in December of that year, and before he signed up for referral in January 1984, comprises another example of the Union's bypassing of discriminatees within the backpay period.

3. Language of the Board's Order

Resolution of the propriety of keeping the backpay period open-ended relies, in part, on the language used by the Board in its remedial order.

As described in section III,A above, the Board established the backpay period for W. Bradley, A. Huggins, and R. Huggins as between specific dates, but treated the remaining discriminatees differently. Scott's backpay period was described as occurring ''*after* November 24, 1981''; Coates'

[13] Huggins' August 3, 1983 registration was still extant. Though he had been referred by the Union in September 1983, that job lasted less than 3 days.

period encompassed time ''*at least*'' until February 10, 1982; and the backpay period for Gray, McMillan, and Poorman included time ''*since*'' March 5, 1982 (for Gray and McMillan) and ''*since*'' July 16, 1981 (for Poorman).[14]

I find the Board's use of the quoted and emphasized words above are wholly consistent with the part of its decision which left it to the instant compliance proceeding to determine the out-of-turn referrals with precision. Implicit in such a task is the potential for uncovering union conduct which would require additions to the specific periods of backpay entitlement the Board had already identified for these five discriminatees.

Words must have some meaning. I conclude ''After'' denotes some antecedent time period beyond November 24, 1981 mentioned by the Board for Scott; ''At least'' signifies a time or times which are no less than that which the Board specified for Coates; and ''Since'' refers to a time following a past time or event. As used regarding Gray, McMillan, and Poorman ''since'' means dates which, of necessity, must follow the March 5, 1982 and July 16, 1981 dates found by the Board. If (as the Union contends) the Board intended its terminology to close the backpay periods of these five discriminatees on the dates set forth in its decision, it readily could have done so by using the phraseology it employed as to A. Huggins, Bradley, and R. Huggins.

I conclude the qualifying words used for Coates, Gray, McMillan, Poorman, and Scott are logical and a pragmatic recognition of the Board-imposed task of searching for specific out-of-turn referrals during the compliance phase of these unfair labor practice cases. In this connection, I note the Board's order provided its make-whole remedy should continue until the Union ''ceases its unlawful conduct by properly referring . . . (the discriminatees) . . . to employment'' (271 NLRB at 783). In this context, each word under consideration inherently suggests a virtual mandate to expand the backpay period, if warranted by the circumstances uncovered during the compliance phase, to future dates not yet in being on the date the Board issued its decision.

In sum, I find the very language of the Board's Decision and Order in the underlying case supports a conclusion that the subject backpay periods were open-ended.

The Union's brief addresses what it calls the ''parameters of the potential backpay periods applicable to each discriminatee.'' Its argument is based on a review of evidence (adduced in the underlying unfair labor practice proceeding) which shows the Union referred the discriminatees to work several times. The Union also points to evidence adduced in the instant proceeding which shows it referred some of the discriminatees to jobs after Judge Ricci's hearing closed. These referrals are asserted to foreclose the notion that any backpay period can be considered open-ended.

It is true that there is evidence Coates was referred on January 1 and March 4, 1984; Gray on March 3, 1984; A. Huggins on July 31 and September 1, 1983, on February 27, December 1 and 23, 1984, and March 27 and April 1, 1985; McMillan on October 1, 1983; and Scott on March 4, 1984. However, it is equally clear that the records do not reliably reflect that those referrals meet the terms of the Board's cease-and-desist language. That language, quoted above, clearly impels the conclusion that the Union could limit its liability only ''by *properly* referring'' [emphasis added] the discriminatees to work. The Union bears the burden of proving these referrals effectively tolled backpay liability. Doubts are to resolved against the Union (*Teamsters Local 70 (Nielsen Freight Lines)*, 265 NLRB 220, 224 (1982). The state of the Union's records creates such doubt.

My examination of the records in evidence compared to the testimony relating to them persuades me the records, as maintained during the times critical in this case, are not useful tools to monitor, reconstruct or police the Union's referral hall operations. (Similar conclusions were reached by the region's compliance officer and the Union's own expert witness, as will be shown below.)

The condition of the referral records, and manner of implementing the hiring hall, establish manifold uncertainties that the Union abated its discriminatory conduct. Such uncertainties are to be resolved against the wrongdoer; in this case, the Union (*NLRB v. Miami Coca Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966); *Dodson IGA Foodliner*, 218 NLRB 1263, 1265 (1975).

The Board itself, in the underlying decision, signalled that the mere showing the Union referred a discriminatee to work is not enough to toll the backpay period. Several referrals of the discriminatees were enumerated by Judge Ricci. The Board's decision patently reflects those referrals did not serve to foreclose continuation of the backpay period. At most, the Board's decision simply shows a referral caused only an interuption, not cessation, of the backpay period (see Board's findings regarding Coates, Gray, McMillan, and Poorman, whose backpay periods are expressed in segmented portions).

Also, I have considered the Union's argument to the effect that any single referral after the close of Judge Ricci's hearing satisfies all requisites for closing a backpay period. Specifically, this argument relates to referrals of Coates, Gray, Poorman, and Scott in March, 1984, to T. N. Ward Co. In other circumstances, the Union's position might have merit. However, the particular situation present here negates reliance on those referrals as dispositive elements regarding backpay termination.

The condition of the referral records makes it impossible to reconstruct data sufficient to confirm, or draw, a conclusion that any of these referrals complied with the requirement that they be ''proper'' referrals. In this context, I find such referrals only amount to a token effort to make a proper referral. In my view, there is no way the totality of evidence in these backpay proceedings can be used to establish that the referrals mentioned were likely to correct the Union's wrongdoing, and that it unequivocally did so. The Board requires clear, unequivocal action by the Union before it will be allowed to escape liability for backpay by a mere token act which is not surely going to correct its prior misconduct (*Iron Workers Local 377 (Judson Steel)*, 208 NLRB 848, 851 (1974); *Iron Workers Local 426 (Tyco Steel)*, 192 NLRB 97 (1971). Although each of these cases was decided in a context different from the case at bar, I find the stated principle applies to the instant case).

The Union's argument that no backpay period can be extended unless based on proof of specific out-of-turn referrals is unpersuasive. The Union cites *NLRB v. Ironworkers Local*

[14] Bradley and R. Huggins are omitted from further discussion in this section because I conclude the Board closed their backpay periods on August 21 and May 19, 1981, respectively. The backpay period of A. Huggins will be separately discussed in sec. III,C(7), below.

483 & Local 11, 672 F.2d 1159 (3d Cir. 1982) in support of its contention. Specifically, the Union asserts, ''As the Court of Appeals noted in . . . [*Ironworkers Local 483*] . . . before damages are assessed . . . [the Union] is entitled to defend itself against 'findings of sufficient specificity so that it is clear when a violation occurred . . . .''' (U. Br. 43.)

I find the Union's argument only superficially appealing. First, I consider *Ironworkers Local 483* materially distinguishable from the present matter. Though the court of appeals did enunciate the need for proof of specific out-of-turn referrals in that case, such proof was being directed to the court's review of the sufficiency of evidence to support the Board's initial findings that unfair labor practices occurred. *Ironworkers Local 483* was before the court on a petition for enforcement of the Board's order. That is an entirely different context from the instant backpay proceeding.

There is another significant difference between *Ironworkers Local 483* and this case. In *Ironworkers Local 483*, one of the issues was whether Local 483 had engaged in widespread and pervasive unfair referral hall practices. In the case at bar, the Board has already decided that very issue. The Board here expressly found this is the type of exceptional case which contains widespread and pervasive discrimination. Its remedial order is, in part, based on that finding; and that order has been enforced by the very same appeals tribunal that decided *Ironworkers Local 483*.

I find the present circustances present a situation which literally cries out for the application of rules which best safeguard the rights of the victims of the Union's discriminatory actions. Such a philosophy comprises the underpinnings of the well-entrenched rule of Board backpay cases that a ''backpay claimant should receive the benefit of any doubt rather than the Respondent . . . .'' (*United Aircraft Corp.*, 204 NLRB 1068 (1973), and cases cited at fn. 3).

The Union's reliance on *Ironworkers Local 483*, I conclude, is a plea for application of rules which simply do not fit the circumstances at hand. The rule of that case applies to situations in which doubt of a respondent's culpability still exists. That is not the case here. To apply the rule to the instant case would reward the Union for continuing its shoddy operation of the referral hall—the very vice which gave rise to these backpay proceedings. The condition of the Union's referral records and its recordkeeping practices set forth in this record require rejection of the Union's argument.

4. Compliance officer's findings

Compliance Officer Curley's activities began in the backdrop of the events reported above, though many of them were yet to be uncovered by him as his efforts progressed.

Curley began his compliance investigation in October 1984. Then, Curley's purpose was to determine how he could reconstruct the Union's referrals to ascertain the precise number of out-of-turn referrals and related matters left by the Board to the compliance stage of the case. He met, in October 1984, with the Union's attorney, Cohen, Weaver, and Union President Dan Woodall. Those union representatives produced the referral book.

Curley testified the records he saw showed only who registered for referral. Lines were drawn through some names in the book. There was no indication of the date the lines were drawn through the names. Curley said he was told those lines could signify one or more events; namely, the person (a) had been referred to work by the Union; (b) had obtained a job without the Union's assistance; or (c) was seen at work on a construction site by Weaver or some other union agent during the course of their travels through the Union's territorial jurisdiction. The referral book did not reflect the dates of referral.

Curley stated he asked Weaver and Woodall whether the Union maintained daily referral sheets. He was told such records were not maintained.[15] Curley testified ''. . . the problem was that there was no record of in-turn or out-of-turn referrals. Basically, all you had was a ledger that the members would sign and whose names would be crossed off and wasn't a real accurate record of people who had been referred or not referred'' (Tr. 60).

Curley discussed the way the book was kept with Weaver and Woodall. They told him there was a problem because there wasn't enough work for all members to keep busy, so they were trying to distribute work equitably, but that it was difficult to keep track of the members because they could obtain work on their own and frequently failed to advise the Union they had a job.

Curley also testified that he saw no record showing which laborers had been present in the referral hall in accordance with the then-operative April 1, 1984 rule requiring those looking for referral to present themselves in the referral hall. Curely concluded the referral book did not contain sufficient information to determine whether any particular individual had been passed over for referral.

Curley told Attorney Cohen, Weaver, and Woodall the Union couldn't ''maintain the status quo because that had been found to be unlawful, and that they had to do something about the way the hall was being operated'' (Tr. 176).

A series of written communications between the Union's attorneys and the Regional Office officials ensued (R. Exh. 8(a-b), 12, 46, 47). The net result was that the Union prepared new, or modified, referral rules as late as June 1986.

However, Curley testified that additional visits to examine the Union's referral records showed the records did not yet contain information from which the Union's referral activities could be traced. He testified the Union had not implemented the terms of its new rules. Specifically, Curley discovered the Union passed the names of people who signed for referral, but did not strike the names of those who were absent from the referral hall. He also found that each day Weaver started to call the names of laborers from the point he ended on the preceding day, instead of returning to the place where unstricken names began. Weaver confirmed this was his procedure). Curley said he concluded this practice was arbitrary and effectively prevented laborers from being offered referrals indefinitely because of the Union's longstanding rule that an individual was not permitted to sign the book a second time until his name from an earlier signing had been stricken.[16]

[15] Formerly, the Union kept ''Work Sent Out Forms.'' Those records did identify such things as names of laborers whom the Union referred to jobs, referral dates, and employer to whom referrals were made. However, Weaver bluntly testified the Union stopped using this record because, in Weaver's words, ''The form actually had no use in the office'' (Tr. 2358).

[16] Apparently, the laborers often ignored this rule. The multiple signing does not affect the disposition of the matter at hand, except as it is a factor which tends to support the contention that the Union's referral records could not be used to reconstruct its postdecisional compliance activities.

Curley informed the Union of his belief this practice was arbitrary. Weaver told Curley he would change the practice and thereafter call names of recently signed laborers (high number in the book) one day and then call names of earlier-signed laborers (low numbers in the book) or those whose names were not stricken the next day. (This was an apparent effort to rectify what Curley found to be an arbitrary system). Curley testified Weaver's alternate day calling system was not satisfactory and that, in any event, Weaver's implementaiton of the referral system continued to be different from the Union's rules and the records were still not valuable guides for reconstruction of the actual referral.

I adopt Curley's conclusion that the Union's referral records during the times critical to these proceedings were literally useless for the necessary purpose of piecing together the Union's referral practices. Curley's testimony is not the sole source of my conclusion. My own examination of the evidence, together with oral testimony germane to it, impels me toward Curley's conclusions. Likewise, Weaver's testimony about how the hiring hall was implemented during the backpay period and his earlier reported admission that the referral book could not be used by itself to paint a true picture of actual referrals has reinforced my opinion that Curley's observations should be adopted.

5. Opinion of the Union's expert witness

Finally, one of the Union's own witnesses characterized the condition of the referral records. Professor Ezra S. Krendel, an expert witness on behalf of the Union, principally testified on the issue of what formula should be used to compute backpay in the instant case. His pretrial preparation caused him to examine the referral book. Professor Krendel gave the following overview of that record:

> . . . I saw a book. A rather chaotic book of entries when laborers got on the list to be called in the hiring hall. And, I remember looking at a large document of that nature and wondering whether there was any coherence to it at all as a record . And, it was kept by different people, as I could see by the handwriting changes. And, it was, I thought, a totally disorganized mess (Tr. 2114).
>
> I looked at the ledger of the hiring hall. And, from what I saw there, it was such a poorly kept record that I couldn't see how it could be used for any physical evidence of activity on the part of the union or not on the part of the union (Tr. 2136-2137).

6. Recapitulation and conclusion

I conclude and find the record contains overwhelming support for the proposition that the backpay periods should be kept open-ended as General Counsel requests. My determination is based on the following factors:

> (a) The Union's continuation of practices which ignored the referral rules;
>
> (b) The numerous bits of evidence which show the Union neither possessed, nor maintained, referral records in such a condition that would permit reconstruction of its referral activities since the underlying unfair labor practice hearing was conducted.

That evidence consists of; (1) the absence of any notations on the yellow sheets of names of persons referred or referral dates; (2) Weaver's testimony that names on the yellow sheets did not make their way into the referral book; (3) Weaver's admission that the yellow sheets were of no use in determining referrals; (4) the failure of Daily Job Referral Activity lists or any other record to reflect reasons for apparent out-of-turn referrals; (5) the evidence showing the referral book in use after August 1, 1986 contained incomplete and misleading information; (6) Weaver's admission the referral process could not be reconstructed from the entries in the referral book; (7) the evidence which shows the Union continued to make discriminatory referrals during the backpay period; (8) the language of the Board's order which reflects a design to keep the backpay period open-ended for some of the discriminatees; 9) the compliance officer's conclusion that the referral activities could not be reconstructed from the Union's referral records; and (10) the opinion of the Union's expert witness that the referral books could serve no useful purpose in this proceeding.

I have considered the inherent difficulty in operating a referral hall which permits employees to solicit jobs without union intervention and also allows employers to avoid using the referral hall. Those difficulties, however, do not govern disposition of this backpay proceeding. What is paramount here is the extent to which the Union's conduct in matters over which it clearly had control sufficiently complies with the Board's order to take action to end its earlier discriminatory conduct and to maintain records to show that it had done so. The record as a whole, I find, simply does not demonstrate the degree of diligence in recordkeeping contemplated by the Board.

I am appreciative of all the efforts the record reflects were made by the Union's attorneys to establish referral rules and conduct which would satisfy the terms of the Board's order. However, the record in its totality shows far less assiduous efforts on the part of those charged with day-to-day operation of the referral hall.

Finally, I am sympathetic to the Union's claim that considerable sums of money emanate from my finding of open-ended backpay periods. However engaging this claim may be, the discriminatees' rights to be compensated for the Union's unlawful conduct are equally captivating. Those rights cannot be defeated or diminished because the Union could not keep track of what it did to comply with the Board's order. Balancing all relevant elements, I am persuaded that there is merit to General Counsel's request that certain of the backpay periods should be treated as open-ended, as appears in the most recent amendment to the backpay specification. My recommended order will reflect this conclusion.

7. Andrew Huggins

Two issues relate particularly to discriminatee Andrew Huggins. First, is it appropriate for General Counsel to reopen this discriminatee's backpay period in the face of the Board's decision which established finite parameters? Second, if A. Huggins' backpay period properly is considered open-ended should it be closed, as General Counsel did on April 9, 1987, or does it continue to run beyond that date, as the Charging Parties claim?

a. *Reopening of A. Huggins' backpay period*

As earlier reported, the Board found A. Huggins' backpay period to be between December 5, 1980 and April 9, 1981. The initial backpay specification limited the backpay claim to that 4-month, 4-day time period. Curley testified that A. Huggins complained several times during the compliance investigation that he had been bypassed for referral. Curley asserted he called those complaints to the attention of union representatives and that, based on his conclusions concerning the state of the Union's referral records, the backpay specification was amended to reopen A. Huggins' backpay period.

A. Huggins' history of registration for referrals and jobs held since the date the Board's decision closed his backpay period is contained in the instant record (See C.P. Exhs. 2–5, 7; and R. Exhs. 20, 31-D). Those records show A. Huggins signed up for referral on September 9 and December 28 1982; on August 3, 1983; on January 27, and February 6, 1984; and as No. 162 and No. 327 under the Unions' April 1, 1984 rules; and as Nos. 233 and 382 in the new referral book beginning August 1, 1986. H & W records (G.C. Exh. 32) and union pension records (R. Exhs. 20, 31-D) show A. Huggins worked for several employers intermittently between July 31, 1983 and March 29, 1986. Insofar as the records permit such a comparison, it appears A. Huggins registered for referral at times consistent with periods of nonemployment.

This evidence of A. Huggins' work history, viewed in isolation, suggests each of the jobs he received was a union referral in consequence of his most recent registration. But there is no evidence to show such referrals were made in proper order.

Indeed, there is evidence to support the conclusion that the Union continued to bypass A. Huggins, as well as other discriminatees, after the date the Board closed A. Huggins' backpay period. The evidence regarding by passing of other discriminatees is described in section III,C(2)(a-n), above. It will not be repeated here. Some of that earlier-reported evidence also applies to A. Huggins (See section III,C(2), subparagraphs (d), (e), (h) and (j), above). That evidence strongly supports the conclusion which I formerly made, in general, that the burden has been cast on the Union to present convincing and cogent evidence that it had stopped its unlawful bypassing of the discriminatees during the backpay period. I now reaffirm that conclusion specifically as to A. Huggins.

Additional evidence exists that the Union's bypassing of A. Huggins still continued as late as 1984. This evidence relates to the referrals of Lawrence King (who testified in the instant hearing) and Shelvin Oates.

King was laid off from Bechtel in September 1984 (G.C. Exh. 40). He testified he then signed the referral book. His name is designated No. 571 (C.P. Exh. 5). A. Huggins' name is designated No. 162 in the same referral book. King testified Weaver telephoned him and referred him to work at Miorelli-Kirlin Co., Inc. in October 1984. Weaver was not asked to refute this part of King's testimony. H & W records for King (G.C. Exh. 40) reflect that Miorelli-Kirlin made fund contributions for him for work that month and into December 1984. King's name is not stricken from the referral book.

Three questions remain unexplained: (1) Why was King, listed in the referral book with a number considerably higher than A. Huggins, referred to a job at a time A. Huggins was awaiting referral?; Why wasn't King's name stricken from the book upon his referral in October 1984?; and why was the referral made by telephone during a time when the rules required laborers seeking referral to be present in the union hall?

I find the absence of reasonably satisfactory responses to these three questions warrants the inference, which I make, that King's October 1984 referral to Miorelli-Kirlin constitutes a bypassing of A. Huggins as late as approximately 3-1/2 years after the Board closed his backpay period.

Regarding Oates, the referral book shows his name designated No. 687. This number is considerably higher than King's referral number was over A. Huggins'. Yet, the records reflect that Oates had been referred to work at Reliance Drilling, Inc. in December 1984 at a time A. Huggins apparently was awaiting referral. Further, the book shows Oates' name was not stricken upon his referral.

Weaver testified the Reliance Drilling job called for a laborer who possessed the ability to perform specialized so-called ''caisson'' work and that Oates was so qualified. I cannot accept Weaver's explanation because documentary evidence which could have corroborated it does not do so. In section III,C2), above, I reported that the Union's daily job referral activity list form (C.P. Exh. 6) was designed expressly to record reasons for out-of-turn referrals, and was in use during the period of Oates' referral. Those records do not at all refer to Oates' December 1984 referral to Reliance Drilling. In this posture, I find Weaver's unsupported attempted justification for Oates' referral insufficient to overcome the adverse implications of Weaver's acknowledgement he referred Oates to the job at Reliance Drilling as the records reflect; and the referral book notations which show this occurred when the immense disparity in referral-number designations apparently entitled A. Huggins to referral consideration long before Oates.[17] Accordingly, I conclude the circumstances surrounding Oates' referral comprise another time the Union continued to bypass A. Huggins long after the Board's closing date of his backpay period. I also conclude this evidence entitles A. Huggins to be accorded the same consideration as the other discriminatees whose open-ended backpay periods have been found justified. Thus, I find merit to General Counsel's claim that A. Huggins is entitled to backpay after April 9, 1981.

b. *Terminal date of A. Huggins' backpay period*

I turn now to disposition of the differences between General Counsel and Charging Parties regarding the date to close A. Huggins' backpay period. As noted previously, General Counsel's termination of A. Huggins' backpay is coextensive with his disability award. the most recent amendment to the backpay specification extends A. Huggins' backpay period to, and terminates it in, the first calendar quarter of 1987. The termination date is based on the April 9, 1987 grant of

[17] I have determined A. Huggins' availability for referral by reference to the Union's and H & W records in evidence. I have relied on a letter from A. Huggins to Curley (G.C. Exh. 30), a document frequently cited by General Counsel as proof of the facts which A. Huggins wrote, only to the extent the Union's and H & W records make Huggins' assertions plausible and probable. Thus, having in mind the rules required laborer's presence for referrals, I accept Huggins' written statement that both he and Oates were present in the referral hall on the date Oates was referred.

elgibility for supplemental social security income based on A. Huggins' blindness (see R. Exh. 29(b)).

Charging Parties have requested A. Huggins' ''backpay period . . . be opened to include the second quarter of 1987.'' (C.P. Br. 32). This request is based on Charging Parties' assertion that A. Huggins' disability did not prevent him from working at his trade. Specifically, Charging Parties point to the uncontested evidence that A. Huggins worked for J. S. Cornell & Son, Inc. in April 1987 (See R. Exh. 20). Charging Parties argue ''. . . the uncontroverted evidence that . . . (A. Huggins) . . . was still working at the trade'' (C.P. Br. 30) after he was awarded disability benefits requires evidence that he actually declined work because of his disability to cut off his backpay entitlement.

My analysis of the record persuades me that the evidence does not sustain Charging Parties' position. I conclude there is insufficient evidence to say, with certainty, there exists ''uncontroverted'' proof A. Huggins actually performed work at the trade *after* he was declared eligible for the supplemental income benefits.

The evidence shows A. Huggins did work for J. S. Cornell in April 1987. His final pay stub reflects Cornell paid him for 8 hours work during the payroll week ending April 12, 1987 (R. Exh. 29(e)). The notification of grant of disability benefits is dated April 9, 1987. This presumably is the date the notification was mailed to A. Huggins. There is no evidence of the date Huggins received it. However, it is fair to assume the notice could not have been received earlier than April 10, a Friday. For the Charging Parties to be factually correct that the evidence shows A. Huggins worked as a laborer after the award of disability benefits, he would have had to perform work for J. S. Cornell on Saturday, April 11.

I consider it strained to imagine the mail delivery on April 10 would have been early enough that day for A. Huggins to have worked the full 8 hours for which he was paid at the end of that payroll week. Also, I have considered the possibility he might have worked on April 12, the very day the payroll week ended. That was Sunday. I find it unlikely he worked that day, particularly because his pay stub indicates the 8 hours' pay was for ''regular'' hours, and contains no reflection that payment comprised overtime earnings.

Viewed in this light, and contrary to Charging Parties, I conclude the record does not contain the ''uncontroverted evidence'' which forms the basis of Charging Parties' second-quarter 1987 backpay claim for A. Huggins. Because of this, I find it appropriate to terminate A. Huggins' backpay period at the end of the first calendar quarter, 1987 as appears in the backpay specification as most recently amended.

IV. THE FORMULA

A. *Applicable Decisional Precedent*

The parties produced abundant testimonial and documentary evidence relating to the appropriateness of the backpay formula contained in the amended backpay specification. In spite of the presence of this seemingly complex evidence, the relevant court and Board decisions clearly provide the basic principles upon which to decide what formula should be used to calculate the backpay due the discriminatees.

The Board's make-whole remedies entitle discriminatees to receive what they would have earned during the backpay period if they had not been victims of unlawful discrimination. Of course, interim earnings are deducted from the wrongdoer's liability. This is a broad concept not simple in its application. Generally, there is no universal formula that measures an exact backpay sum, because the discriminatees often do not actually work during the backpay period, or do so on a reducted, erratic, or under other conditions different from those which existed before the discrimination.

The Board has wide discretion in developing procedures and methods of backpay determination. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *NLRB v. Seven-up Bottling Co. of Miami*, 344 U.S. 344, 346–348 (1953). The Board ''may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations'' (*NLRB v. Brown & Root*, 311 F.2d 447, 452 (8th Cir. 1963) in performance of its backpay obligations (see also *Iron Workers Local 378 (Judson Steel)*, 213 NLRB 457, 458 (1974), remanded 532 F.2d 1241 (9th Cir. I976)). Once the General Counsel's formula has been established, it must be accepted if it is reasonable and not arbitrary (*Fibreboard Co.*, supra; *Bakers Council of Greater New York v. NLRB*, 555 F.2d 304 (2d Cir. 1977); *NLRB v. Iron Workers Local 378*, supra).

Certain other court and Board decisions are especially applicable to this case. Those decisions pertain to the nature of the General Counsel's formula used in the instant case. This formula uses the so-called ''representative employee'' method of backpay computation. This technique bases backpay upon the average earnings of employees who, during the backpay period, worked in jobs similar to the discriminatee's before the occurrence of the unfair labor practice. This mode of calculating backpay has long been used by the Board and has been judicially approved (*Midwest Hanger Co.*, 221 NLRB 911 (1975), affd. 550 F.2d 1101 (8th Cir. 1977); *Ambrose Distributing Co.*, 178 NLRB 721, 723–725 (1969), enfd. 439 F.2d 720 (9th Cir. 1971); *J. H. Rutter-Rex Mfg. Co.*, 158 NLRB 1414 (1966), modified on other grounds 399 F.2d 356 (5th Cir. 1968), Board decision affd. 396 U.S. 258 (1969)).

The Respondent in backpay proceedings has the burden of showing that the ''representative'' group of employees selected by General Counsel does not actually possess the homogenous characteristics contemplated by this formula (See *Honda of Mineola*, 233 NLRB 81, 82 (1977) where the Board let stand its administrative law judge's observation that a backpay respondent's general burden of proving economic defenses to the proposed backpay formula applies to respondent's claim that the General Counsel's ''representative'' group actually is not valid for the intended comparative purposes).

I have used the above-cited decisional authority as guideposts to determine whether or not General Counsel's proposed backpay formula is appropriate. As will be shown below, I conclude it is.

B. *Parties' Contentions*

The General Counsel contends the formula proposed in the backpay specification is reasonable under all the circumstances of this case. It is one of the four customarily used and recommended approaches to backpay computation prescribed in General Counsel's Casehandling Manual, sec-

tions 10536 through 10544.4. Those sections are based on court-sanctioned formulas.

In particular, General Counsel urges use of the ''representative employee'' formula uniquely fits the factual backdrop of the instant case because it approximates, as closely as possible, what each discriminatee could have expected to earn during the backpay period if working at the trade at that time. Thus, the proposed formula uses the average earnings of who General Counsel claims are comparable employees; specifically, a random sample of the Union's members who worked in the construction industry during the backpay period. General Counsel asserts the method used to develop the backpay specification inherently adjusts for the seasonal nature of the construction industry, possible periods of lack of work, those individuals who may have obtained work directly from an employer and not through the Union's referral hall, those who may have had a work specialty, and those who worked consistently for a particular employer.

The Charging Parties apparently agree with General Counsel's position. They urge adoption of the formula as contained in the backpay specification.

The Union argues that no single formula is applicable to all eight discriminatees. Alternately, the Union contends that the General Counsel's formula is arbitrary and unsound. Specifically, the Union claims General Counsel's sample is actually not ''representative'' because its random nature does not truly reflect earnings expectations.

The Union proposes a substitute backpay formula which, it contends, more fairly predicts what the discriminatees could have been expected to earn during the backpay period. The Union's formula is based on the work history of each discriminatee for specific time periods before the discrimination. Such a method, according to the Union, would produce a base of personal work habits and behavior which present a more reliable source than General Counsel's for assessing earnings approximations of particular discriminatees during the backpay period.

The Union does not challenge the accuracy or legitimacy of the sums appearing in the backpay specification as interim earnings, vacation hours, pension hours and amounts due for vacation, pension contributions, or a medical expense claim of Scott in fourth quarter, 1983.[18]

C. *The Competing Computation Methods*

1. The General Counsel's method

I reported, in section III,C(4), that Compliance Officer Curley's first efforts to establish the sums due the discriminatees involved an attempt to uncover specific out-of-turn referrals during the backpay period. When he concluded the condition of the Union's records did not permit him to accomplish that task, he resorted to application of the ''representative employee'' formula, as prescribed in the General Counsel's Casehandling Manual, section 10542–10542.3

Curley obtained a list of the union members. That list contained more than 1100 names. Curley's objective was to establish the group of laborers similarly situated to the discriminatees. This group was to comprise the base of ''representative'' employees.

Curley eliminated those members whose ''status date'' fell after 1980. Curley assumed the ''status date'' was equivalent to the date an individual had been admitted to membership. He testified that excluding people who had become members during the backpay period would provide a group of laborers most similarly situated to the discriminatees because the newer members would have been working during the backpay period when the discriminatees did not work. As it developed, Curley's belief that ''status date'' signified membership was incorrect. Actually, that term referred to the most recent date the Union's members were current in dues.[19]

Curley systematically deleted the names of persons with status dates after December 29, 1980. Six hundred and fifty names remained on the membership list when the deletions were completed. Curley then obtained wage and benefit fund contribution data. He testified he intended to use that information to develop past earnings as a predictor of what earnings might have been expected during the backpay period. However, he found a ''drastic decline'' (Tr. 130) in hours worked by some of the discriminatees in the 2 years immediately before the discrimination took place. This decline coincided with the internal conflict between the Union's incumbent officials and the discriminates who actively were trying to unseat them (See 271 NLRB 777 at 789–793). This was the very context in which the discrimination underlying these proceedings arose.

Also, the union officials suggested that Curley's anticipated use of hours worked during the late 1970s would present a distorted picture. They told Curley there was a boom in the construction industry those years, but a deep recession followed in 1980.

Further, Curley testified he believed the hours worked in 1975–1977 were too remote for effective use as predictors of potential earnings during the post-1980 backpay period. Also, he stated he considered other factors such as the fact McMillan and Gray were ineligible for referral to Bechtel during the backpay period because they had been terminated for cause. Therefore, Curley said he was concerned that the Union would object to the use of 1978–1980 hours worked by Gray and McMillan as being nonrepresentative and invalid predictors of their expected earnings after 1980.

Because of the various considerations described above, Curley set out to establish a single basis applicable to all the discriminatees, particularly because ''the Board has sort of used the same language with all of them as to all out-of-turn referrals that they didn't receive'' (Tr. 132). He decided to use the average earnings of a sample from the 650 laborers whose names remained on the membership list. Curley testified such a sampling would encompass changes in economic conditions in the construction industry, as well as its seasonal nature.

Curley developed his sample by use of a so-called ''Random Digits'' table (G.C. Exh. 9). His ''universe'' consisted

[18] The Union claims it is error to apply the backpay formula to calendar quarters and that annual computations are more appropriate. Because the Supreme Court sanctioned quarterly computations in 1953 in *NLRB v. Seven-Up Bottling Co. of Miami*, supra, I find it unnecessary to discuss this contention further.

[19] I find Curley's erroneous understanding has no negative impact upon the reasonableness of General Counsel's development of the random sample finally used for backpay computation. This is so because: (a) no evidence was offered to show that the misunderstanding caused anyone to be improperly included or excluded from the random sample; and (b) even the Union adopted General Counsel's sample in presenting its alternative formulas.

of the 650 names. Each name was numbered sequentially in chronological order. Curley testified, without contradiction, that a 5-percent sample would produce a valid indicator of earnings predictability, but he extracted 80 names which amounted to a sample of 12.3 percent. The 80 names were extracted from the list of 650 according to their numerical designation which corresponded to three-digit numbers Curley obtained from three-digit ''blocking'' of the numbers which were contained on the ''Random Digits'' table (Tr. 137–138).

Curley next set out to determine the number of hours worked by the 80 laborers in his sample. He eliminated 31 names: 21 because the records he examined showed the persons represented showed no work hours for which laborers' H & W fund contributions were made during the backpay period (signifying they performed no work similar to that of the discriminatees); and 10 additional names for whom no earnings information had been supplied. Thus, the names of 49 union members emerged.

Curley used these 49 names as his group of ''representative'' employees. No distinction was made between individuals who might have obtained their jobs directly from employers without using the referral hall or those who returned to work because specifically requested by an employer. Also, no effort was made to eliminate people who may have worked during the backpay period as stewards, because they had special qualifications for a particular job or were so-called ''company men'' (a laborer associated with a particular contractor and who moves from job to job with that employer). Curley testified such adjustments were impossible because the Union's records simply did not contain such information.

Curley then refined this formula by averaging hours of the representative group during the backpay period on a quarterly basis. He also made adjustments for disability periods of discriminatees Gray and A. Huggins, for interim earnings, vacations, and for pension and H & W benefits.

2. The Union's method

Professor Krendel testified he holds two positions at the University of Pennsylvania. At the Wharton School, he is professsor of statistics; and at the School of Engineering and Applied Sciences, he is professor of systems engineering. He characterized the manner in which General Counsel utilized the random sample as naive, irrelevant, and ridiculous and claimed General Counsel needed to consider the discriminatees' own work histories in the years preceding the discrimination to compensate for fluctuations in individual behavior patterns and changing economic cycles.

Professor Krendel was the author of the Union's alternative formulas. More than one alternate computation was presented. However, each was predicated on Professor Krendel's insistence that any proper formula would have to contain adjustments for the individual differences described above. He explained his method of computation was akin to a stratified sample and that stratification is designed to account for individual differences. His computations, however, did not use a stratified sample.

Professor Krendel testified that random samples are better used for making projections as to groups more homogenous than that found among the discriminatees. Thus, each of the Union's alternate formulas is based on the work histories of each discriminatee. There is one exception; R. McMillan. Professor Krendel testified he made no camputation for McMillan because the records he used reflected only a single year of work history and that period of time was not enough to establish a pattern of McMillan's work habits.

Although Professor Krendel's claim that General Counsel's formula does not produce accurate predictions of expected earnings during the backpay period, the professor accepted General Counsel's random sample of 49 members as reasonable and used it in developing the Union' alternative formulas.

Specifically, Professor Krendel compared the work histories of the group of 49 members in particular years preceding the discrimination to the work histories of each discriminatee (except McMillan) in those same years. This procedure yielded a percentage of time that each discriminatee worked compared to the average number of hours worked by those in General Counsel's sample in the years selected.

Professor Krendel first chose 1979 and 1980 to make his calculations. He explained those years were used because accuracy of predictability diminishes as computations are based on time periods more further removed from the discriminatory conduct. Then, in order to meet the criticism that the years Professor Krendel selected were too close to when the discrimination occurred, the same camparisons were made by the professor for the years 1977–1978 and also 1977–1980.

Professor Krendel testified the 4-year (1977–1980) comparison was best among the three periods surveyed because it gave the broadest view. He acknowledged, however, that this period of time was not necessarily more accurate than that used by General Counsel. The net result of Professor Krendel's effort vastly reduced the amount of backpay from what is claimed by General Counsel (see alternative calculations, R. Exh. 26 and Exh. 1 attached to R. Exh. 50).

D. *Analysis and Conclusions*

I conclude General Counsel's method of backpay computation is reasonable, not arbitrary, and proper for use in the particular circumstances of the instant case. The calculations are based on the approved, and commonly used, representative employee formula (see *Midwest Hanger Co.*; *Ambrose Distributing Co.*; and *J. H. Rutter-Rex Mfg. Co.*, supra).

Considerable, and sometimes confusing, evidence and argument has been developed on the record to extol and criticize the parties' proposed formulas. Yet, I conclude there is only one critical question to be answered: Does the evidence show General Counsel's random sample of 49 individuals is ''representative'' in terms of who was included and the years selected?

I find there is no serious dispute concerning the specific individuals General Counsel selected to include in the group of 49. This finding is made in spite of the ample rhetoric and argument to the contrary because, in the final analysis, each alternative formula proposed by the Union is predicated on Professor Krendel's acceptance of General Counsel's random sample (Tr. 2123).

Professor Krendel testified he made no judgment as to the content, or selection method, of the random sample (Tr. 2153). In fact, the professor conceded the sample of 49 ''was a fairly broad sample . . .'' (Tr. 2145) of the laborers' population. In these circumstances, I must presume the sample is

a valid base for the necessary backpay calculations required in this case.

If the sample were incapable of being used to establish average earnings, it was incumbent on the Union to prove that point (*Honda of Mineola*, supra. Remarkably, the Union here actually used General Counsel's sample as an integral part of all alternate backpay models. On the state of this record, I find the Union has not sustained its burden.

I have considered the Union's claim that the sample is unrepresentative because it includes foremen, stewards, and laborers who did not use the referral hall. That claim is rejected because (a) the very nature of the random sample inherently adjusts for such contingencies, if they existed; and (b) the claim is largely based on Weaver's self-serving oral testimony, unsupported by documentary evidence. See my discusison relating to Weaver's reliability as a witness in section III,C(2a-2n), above.

I also have evaluated the Union's argument that General Counsel's sample applies to an industrial context and should not be used in the instant construction industry setting. The Union asserts ''The Board rejected the use of the industrial approach as inappropriate in a construction industry case . . . .'' in *Painters Local 277 (Polis Wallcovering)*, 282 NLRB 402 (1986), hereafter (and in the official transcript) referred to as the *Pygatt* case. I find the Union's reliance on *Pygatt* is misplaced. It is true that *Pygatt* arose in the construction industry, and that a statistical technique used in straight production industry cases was used to compute amounts claimed due in a backpay specification. It is also true that the Board rejected the use of that technique in *Pygatt*.

However, the Board's rejection does not establish the broad principle which the Union expounds. Instead, the rejection clearly is limited to the elimination of part-time employees from the ''representatve'' sample. The Board concluded part-timers should be included to avoid an artificial increase in hours claimed due the discriminatee. In all other respects, the Board left undisturbed the use of the representative employee formula and the sample selected for computation of backpay under it. Accordingly, I reject the Union's plea that the *Pygatt* case supports the proposition that General Counsel's approach in the instant case is arbitrary, unsound, and finds no support in prior Board cases.

I now turn to consider the propriety of General Counsel's use of the average hours worked by members of the random sample during the backpay period as the approximate indicator of the hours each discriminatee could have worked during that time period. The backpay specification identifies the average number of hours worked by the laborers in the random sample, on a quarterly basis, beginning with the fourth calendar quarter, 1980 and ending in the first calendar quarter, 1987.

Initially, I note that use of these years conforms to the General Counsel's Casehandling Manual instructions (sec. 10542.1). In relevant part, the mamual provides: ''earnings in each pay period of the *backpay period* are used as the measure of what the discriminatee would have earned. Where there are several such employees, the average of their earnings per pay period as a representative group may be used as that measure.'' (Emphasis added.)

The instruction, quoted immediately above, is derived from Board pronouncements, with court approval (See *Rice Lake Creamery Co.*, 151 NLRB 1113, 1118–1119 (1965), affd. as to backpay formula 365 F.2d 888 (D.C. Cir. 1966); *International Trailer Co.*, 150 NLRB 1205, 1208–1210 (1965); *East Texas Steel Castings Co.*, 116 NLRB 1336, 1337–1138, 1353 (1956), enfd. 255 F.2d 284 (5th Cir. 1958); *West Texas Utilities Co.*, 109 NLRB 936 (1954).

I also note the Casehandling Manual's observation that the representative employee formula is especially applicable to long backpay periods (sec. 10542.2). Thus, I find General Counsel's selection of average hours worked by members of the random sample in conformity with established protocol and is reasonable.

Another reason exists for my conclusion. I am particularly impressed by the evidence which shows the years selected by General Counsel studiously avoided the period of time when the Union's discriminatory conduct most likely adversely affected the discriminatees' work opportunities. By comparison, the 1977–1980 period claimed best by Professor Krendel obviously included the periods when the work habits factor he emphasized as necessary would have been utterly distorted.

In fact, Professor Krendel conceded he had not considered whether the discriminatees' work opportunities might have been different from those laborers in the random sample. He acknowledged that he simply assumed the discriminatees had work opportunities similar, or identical, to members of the sample (Tr. 2154–2155). In my view, such an assumption ignores the potential effects of the Union's conduct found unlawful in the underlying unfair labor practice proceedings.

The impact of ongoing activity which would be declared unlawful but for its occurrence outside the Act's statute of limitations is an important factor. It should not be overlooked in this case. I have noted above that Judge Ricci observed such activity in the instant case. In such a situation, it is appropriate, and I find it emminently fair, to exclude such stressful periods from use in development of the backpay formula in the instant case (see *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167 (1983).

General Counsel's Casehandling Manual expressly directs that earnings and hours during periods of ''turmoil and disturbance'' which immediately precede an unfair labor practice ''*must* not be used in computing averages on which gross backpay will be based'' (sec. 10562, Casehandling Manual (emphasis added). This directive is consistent with Board law. See *Laborers Local 38*, supra; and *Hill Transportation Co.*, 102 NLRB 1015; 1021 (1953).

Judge Ricci noted that the discriminatees were marked for special negative treatment in the hiring hall because of their activity as political dissidents starting in 1978. The chronicle of threats to deny referral opportunities to the discriminatees appears in Judge Ricci's decision at 271 NLRB 777, 789–792. The Board found (271 NLRB at 781) that certain of such threats were barred by Section 10(b) as separate unfair labor practices. Nonetheless, those examples of the Union's conduct were deemed supporting evidence for the discriminatory nature of the referral failures during the post-10(b) date.

I have utmost respect for Professor Krendel's credentials and the analyses he made in this proceeding. However, he clearly did not consider that the Union's 1978, 1979, and 1980 conduct toward the discriminatees had an inescapably detrimental impact upon their work opportunities. That effect, I conclude, prevents acceptance of the Union's effort to

use the discriminatees' work habits in those years as a factor to predict or estimate future earning expectations.

In contrast, I find the General Counsel's formula is more reflective of the conditions of the workplace relevant to this case. That formula accounts for the effects of the Union's hostile attitude toward the discriminatees. It also seeks to avoid and reduce artificial inflation and deflation of the average hours worked by members of the representative sample by inclusion of laborers in a variety of categories such as those who performed no work in a particular backpay year, nonusers of the referral hall, stewards and ''company men.'' Also, it inherently adjusts for changes in economic conditions. Finally, this formula conforms to time-honored, and approved, backpay concepts, cited above.

I am persuaded by the record as a whole that the General Counsel's formula, as it appears in the amended backpay specification, is both reasonable and most appropriate in all the circumstances of the instant case. Accordingly, I shall adopt it in framing the recommended order.

V. THE REMEDY

The General Counsel has requested that the order herein contain a provision that the backpay periods be kept open until the Board itself issues its Supplemental Decision and Order in the instant case. *Florida Steel Corp.*, 273 NLRB 889 (1984), is cited as authority for this request.

This request was made, for the first time, in General Counsel's posthearing brief. Customarily, I frown on interjection of previously unmentioned theories at such a late stage of Board proceedings. This is especially true if parties are at risk of being prejudiced by such activity.

Here, more than 6 months have elapsed since briefs were filed, but no other party has attempted to address this remedial request. Moreover, my understanding of the above-cited *Florida Steel* decision leads me to conclude a judgment on General Counsel's request requires a determination of a matter of law, and no additional evidence is needed to do so. I shall, therefore, rule on this issue.

My ruling is based on two statements contained in footnote 12 of the Board's decision in the *Florida Steel* case. the first is that ''. . . Respondent is liable for backpay for the period between the date of the judge's decision and this supplmental decision and order . . . . Although it was an employer, not a union as in the instant case, which was respondent in *Florida Steel*, I find enough similarities between the cases to warrant application of the quoted principle. Thus, both cases involve situations of continuing discrimination.

I have been careful not to make independent new findings that the Union engaged in unlawful conduct during the backpay period. I could have found the Union's conduct in the backpay period actually was discriminatory, because I conclude that issue was fully litigated in the instant proceedings even though the backpay specification does not expressly contain such allegation. *NLRB v. Operating Engineers Local 925*, 460 F.2d 589, 599–602 (5th Cir. 1972). Instead, I have noted instances of actions by which the Union appears to have continued its bypassing of the discriminatees for referral during the backpay period. It is that conduct which I find analogous to *Florida Steel*.

Also, in both cases, the respondent claims that its past unlawful conduct has been fully remedied. My findings regarding the manner in which the Union has implemented the hiring hall and kept referral records during the backpay period patently refute such an assertion in the instant case.

The scenario depicted in the two immediately preceding paragraphs convinces me there is merit to the General Counsel's request.

The second germane statement of the Board in footnote 12, *Florida Steel* is that ''The backpay proceeding cannot be closed until a final determination by the Board.'' This quotation signifies the continuing character of such proceedings. It is warrant for accummulation of backpay beyond that specified in the formal pleadings until a wrongdoer establishes to the Board's satisfaction that all facets of the Board's remedial order in the underlying unfair labor practice case have been fully performed. My overview of the instant case in its entirety reflects this case is far from ripe for closing.

On all of the foregoing discussion concerning the recent remedial request of General Counsel, I find it appropriate that the backpay periods herein continue to run until the Board issues its Supplemental Decision and Order in the instant case. My recommended order below will contain such a provision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

Laborers Local No. 135, its officers, agents, and representatives, shall make whole the individuals listed below by paying to them the sums set opposite their names. The specific calculations from which these sums are derived appear in appendices A through H, attached to this Supplemental Decision and Order.

The amounts due each discriminatee shall be paid with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

W. Bradley: $5078.44 as net backpay; and $677.45 as pension credit.

H. Coates: $42,327.67 as net backpay; $399.33 vacation pay; and $9152.41 as pension credit.

F. Gray: $10,694.41 as net backpay; $437.08 vacation pay; and $8390.50 as pension credit.

A. Huggins: $35,188.48 as net backpay; $154.00 vacation pay; and $4941.96 as pension credit.

R. Huggins: $3113.04 as net backpay; and $255.00 as pension credit.

R. McMillan: $39,326.14 as net backpay; $257.79 vacation pay; and $3946.35 as pension credit.

R. Poorman: $50,929.56 as net backpay; $437.08 vacation pay; and $6588.04 as pension credit.

G. Scott: $46,997.84 as net backpay; $2215.25 for medical expenses; $437.40 vacation pay; and $6519.51 as pension credit.

IT IS FURTHER ORDERED that the backpay periods be kept open until the issuance date of the Board's Supplemental Decision and Order in this proceeding, and all sums due as set forth above, including interest, shall be adjusted to that date.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX A

WILSON BRADLEY

	AVERAGE HOURS	*GROSS BACKPAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*PENSION HOURS*	*PENSION CREDIT*
1980						
4th	94	$921.20		$921.20	94	$79.90
1981						
1st	260	2,548.00	1,017.44	1,530.56	198	168.30
2d	381	4,053.84	1,482.41	2,571.43	291	247.35
3d	214	2,364.70	2,309.45	55.25	214	181.90
TOTALS:				$5,078.44		$677.45

APPENDIX B

HAROLD COATES

	AVG. HRS.	*GROSS BACKPAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*PENSION/VACATION HRS.*	*VACATION PAY*	*PENSION CREDIT*
1981							
1st	172	$1,685.60		$1,685.60	172		$146.20
2d	324	3,447.36		3,447.36	324		275.40
3d	26	287.30		287.30	26		22.10
4th	163	1,801.15		1,801.15	163		138.55
1982							
1st	256	2,828.80	$176.80	2,652.00	240		204.00
2d	360	4,219.20	408.00	3,811.20	330		303.60
3d	331				331		314.45
4th	289	3,482.45	3,292.00	190.45	289		274.55
1983							
1st	267	3,217.35		3,217.35	267		253.65
2d	263	3,300.65		3,300.65	263		289.30
3d	305	3,904.00		3,904.00	305		366.00
4th	289	3,650.07		3,650.07	289	$48.41	346.80
1984							
1st	326	4,091.30	862.64	3,228.66	255	63.75	306.00
2d	375	4,755.00		4,755.00	375	93.75	652.50
3d	382	4,870.50	1,872.00	2,998.50	262	65.50	524.00
4th	274	3,548.30	149.92	3,398.38	274	68.50	548.00
1985							
1st	174				174	43.50	348.00
2d	193				193	15.92	399.51
3d	176				176		369.60
4th	156				156		327.60
1986							
1st	167				167		350.70
2d	221				221		464.10
3d	241				241		506.10
4th	244				244		512.40
1987							
1st	206				206		432.60
2d	227				227		476.40
3d							
4th							
TOTALS:				$42,327.67		$399.33	$9,152.41

APPENDIX C

FRED GRAY

	AVG. HRS.	*ADJUSTED AVG. HRS.*	*GROSS BACKPAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*PENSION/VACATION HRS.*	*VACATION PAY*	*PENSION CREDIT*
1981								
2d	251	251	$2,670.64		$2,670.64	251		$213.35
1982								
1st	77	77	850.85		850.85	77		65.45
2d	360	42	492.24		492.24	42		38.64
3d	331	73	879.65		879.65	73		69.35
4th	289	289	3,482.45	$1,648.26	1,834.19	289		274.55
1983								
1st	267	267	3,217.35	2,436.76	780.59	267		253.65
2d	263	263	3,300.65	2,870.80	429.85	263		289.30
3d	305	305	3,904.00	2,683.76	1,220.24	305		366.00
4th	289	289	3,650.07	2,242.50	1,407.57	289	$48.41	346.80
1984								
1st	326	326	4,091.30	3,176.38	914.92	326	81.50	391.20
2d	375	375	4,755.00	3,283.95	1,471.05	335	83.75	582.90
3d	382	382	4,870.50	2,948.53	1,921.97	382	95.50	764.00
4th	274	274	3,548.30	2,015.39	1,532.91	274	68.50	548.00
1985								
1st	174	174				174	43.50	348.00
2d	193	193				193	15.92	399.51
3d	176	176				176		369.60
4th	156	156				156		327.60
1986								
1st	167	167				167		350.70
2d	221	221				221		464.10
3d	241	241				241		506.10
4th	244	244				244		512.40
1987								
1st	206	206				206		432.60
2d	227	227				227		476.70
TOTALS:					$10,694.41		$437.08	$8,390.50

APPENDIX D

ANDREW HUGGINS

	AVG. HRS.	*ADJUSTED AVG. HRS.*	*GROSS BACKPAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*PENSION/VACATION HRS.*	*VACATION PAY*	*PENSION CREDIT*
1980								
4th	94	94	$921.20	$290.00	$631.20	94		$79.90
1981								
1st	260	260	2,548.00		2,548.00	260		221.00
4th	326	326				326		277.10
1982								
1st	256	256	2,828.80	445.85	2,382.95	256		217.60
2d	360	360	4,219.20	2,695.52	1,523.68	167		153.64
3d	331	331	3,988.55	2,399.63	1,588.92	135		128.25
4th	289	289				28		26.60
1983								
1st	267	213	2,566.65	1,547.54	1,019.11	109		103.55

APPENDIX D—Continued

ANDREW HUGGINS

	AVG. HRS.	*ADJUSTED AVG. HRS.*	*GROSS BACKPAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*PENSION/VACATION HRS.*	*VACATION PAY*	*PENSION CREDIT*
1984								
1st	326	200	2,510.00	643.00	1,867.00	81	$20.25	97.20
2d	375	375	4,755.00	643.00	4,112.00	353	88.25	614.22
3d	382	142	1,810.50	643.00	1,167.50	142	35.50	284.00
1985								
1st	174	160	2,088.00	1,120.00	968.00	7	1.75	14.00
2d	193	193	2,601.64	2,072.00	529.64	100	8.25	207.00
3d	176	176	2,411.20	296.00	2,115.20	160		336.00
4th	156	156	2,137.20		2,137.20	156		327.60
1986								
1st	167	167	2,287.90	219.20	2,068.70	151		317.10
2d	221	221	3,138.20		3,138.20	221		464.10
3d	241	241	3,482.45	1,040.40	2,442.05	169		354.90
4th	244	244	3,525.80		3,525.80	244		512.40
1987								
1st	206	206	2,976.70	1,553.38	1,423.33	98		205.80
TOTALS:					$35,188.48		$154.00	$4,941.96

APPENDIX E

RANDY HUGGINS

	AVERAGE HOURS	*GROSS BACKPAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*PENSION HOURS*	*PENSION CREDIT*
1981						
1st	94	$921.20		$921.20	94	$79.90
2d	206	2,191.84		2,191.84	206	175.10
TOTALS:				$3,113.04		$255.00

APPENDIX F

RITA MCMILLAN

	AVG. HRS.	*GROSS BACKPAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*PENSION/VACATION HRS.*	*VACATION PAY*	*PENSION CREDIT*
1981							
2d	251	$2,670.64		$2,670.64	251		$213.35
3d	85	939.25	$442.00	497.25	45		38.25
4th	137	1,513.85		1513.85	137		116.45
1982							
1st	77	850.85		850.85	77		65.45
2d	360	4,219.20		4,219.20	360		331.20
3d	331	3,988.55		3,988.55	331		314.45
4th	289	3,482.45		3,482.45	289		274.55
1983							
1st	267	3,217.35		3,217.35	267		253.65
2d	263	3,300.65		3,300.65	263		289.30
3d	305	3,904.00	483.06	3,420.94	305		366.00
4th	289	3,650.07	1,821.20	1,828.87	145	$24.29	174.00
1984							
1st	326	4,091.30		4,091.30	326	81.50	391.20
2d	375	4,755.00	740.75	4,014.25	375	93.75	652.50

APPENDIX F—Continued

RITA MCMILLAN

	AVG. HRS.	*GROSS BACK-PAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*PENSION/VA-CATION HRS.*	*VACATION PAY*	*PENSION CREDIT*
3d	233	2,970.75	740.76	2,229.99	233	58.25	466.00
TOTALS:				$39,326.14		$257.79	$3,946.35

APPENDIX G

ROY POORMAN

	AVG. HRS.	*GROSS BACK-PAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*PENSION/VA-CATION HRS.*	*VACATION PAY*	*PENSION CREDIT*
1981							
1st	260	$2,548.00	$78.40	$2,469.60	252		$214.20
2d	381	4,053.84		4,053.84	381		323.85
3d	358				342		290.70
4th	326	3,602.30	2,759.00	843.30	326		277.10
1982							
1st	256	2,828.80		2,828.80	256		217.60
2d	360	4,219.20	2,297.15	1,922.05	159		146.28
3d	331				65		61.75
1983							
1st	267	3,217.35	2,460.13	757.22	71		67.45
2d	263	3,300.65	1,203.07	2,097.58	167		183.70
3d	305	3,904.00		3,904.00	305		366.00
4th	289	3,650.07		3,650.07	289	$48.41	346.80
1984							
1st	326	4,091.30	502.00	3,589.30	286	71.50	343.20
2d	375	4,755.00		4,755.00	375	93.75	652.50
3d	382	4,870.50		4,870.50	382	95.50	764.00
4th	274	3,548.30		3,548.30	274	68.50	548.00
1985							
1st	174	2,270.70		2,270.70	174	43.50	348.00
2d	193	2,601.64		2,601.64	193	15.92	399.51
3d	176	2,411.20		2,411.20	176		369.60
4th	156	2,137.20		2,137.20	156		327.60
1986							
1st	162	2,219.26		2,219.26	162		340.20
TOTALS:				$50,929.56		$437.08	$6,588.04

APPENDIX H

GEORGE SCOTT

	AVG. HRS.	*GROSS BACKPAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*MEDICAL EX-PENSES*	*PENSION/VA-CATION HRS.*	*VACATION PAY*	*PENSION CREDIT*
1981								
4th	143	$1,580.15		$1,580.15		143		$121.55
1982								
1st	256	2,828.80	$501.75	2,327,05		220		187.00
2d	360	4,219.20		4,219.20		360		331.20
3d	331	3,988.55		3,988.55		331		314.45
4th	289	3,482.45	1,684.50	1,797.95		289		274.55
1983								
1st	267	3,217.35		3,217.35		267		253.65
2d	263	3,300.65		3,300.65		263		289.30

APPENDIX H—Continued

GEORGE SCOTT

	AVG. HRS.	*GROSS BACKPAY*	*INTERIM EARNINGS*	*NET BACKPAY*	*MEDICAL EXPENSES*	*PENSION/VACATION HRS.*	*VACATION PAY*	*PENSION CREDIT*
3d	305	3,904.00		3,904.00		305		366.00
4th	267	3,372.21		3,372.21	$2,215.25	267	$44.72	320.40
1984								
1st	326	4,091.30	401.60	3,689.70		302	75.50	362.40
2d	375	4,755.00	204.00	4,551.00		375	93.75	652.50
3d	382	4,870.50	541.51	4,328.99		382	95.50	764.00
4th	274	3,548.30	320.00	3,228.30		274	68.50	548.00
1985								
1st	174	2,270.70		2,270.70		174	43.50	348.00
2d	193	2,601.64	2,316.00	285.64		193	15.92	399.51
3d	176	2,411.20	1,680.00	731.20		176		369.60
4th	156	2,137.20	1,932.00	205.20		156		327.60
1986								
1st	162					138		289.80
TOTALS:				$46,997.84	$2,215.25		$437.40	$6,519.51